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AND THE

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Page	*Line*	
121	7	from bottom of page, *for* "SIR BARNES PEACOCK," *read* "LORD FITZGERALD."
317	4	*C. M. Le Breton* was also of counsel for the appellant.
530 535		The name of the junior counsel with *Ambrose* Q.C. and *Maberly* in *Murray* v. *Scott*, *Agnew* v. *Murray*, and *Brimelow* v. *Murray*, should be not *Edwyn Jones*, but *Edwin Jones*.
640	25	*for* last word of head-note "damages" *read* "costs."

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (E.)
1883
Nov. 26.

FERDINAND LONGFIELD SPEIGHT AND OTHERS . . . . APPELLANTS;

AND

ISAAC GAUNT . . . . RESPONDENT.

Trustee and Cestui que Trust—Liability of Trustee for Trust Moneys lost through Broker.

A trustee investing trust funds is justified in employing a broker to procure securities authorized by the trust and in paying the purchase-money to the broker, if he follows the usual and regular course of business adopted by ordinary prudent men in making such investments.

A broker employed by a trustee to buy securities of municipal corporations authorized by the trust, gave the trustee a bought-note which purported to be subject to the rules of the London Stock Exchange and obtained the purchase-money from the trustee upon the representation that it was payable the next day, which was the next account day on the London Exchange. The broker never procured the securities but appropriated the money to his own use and finally became insolvent. Some of the securities were procurable only from the corporations direct and were not bought and sold in the market, and there was evidence that the form of the bought-note would have suggested to some experts that the loans were to be direct to the corporations; but (as the House held on the facts) there was nothing calculated to excite suspicion in the mind of the trustee or of an ordinary prudent man of business; and such payment to a broker was in accordance with the usual course of business in purchases on the London Exchange:—

Held, affirming the decision of the Court of Appeal (Lord FitzGerald doubting), that the trustee was not liable to the cestuis que trust for the loss of the trust funds.

Semble, by the Earl of Selborne L.C. that if the broker had represented to the trustee that the contracts were with the corporations for loans direct to them from the trustee he would not have been justified in paying the money to the broker, for which in such a case there would have been no moral necessity or sufficient practical reason.

APPEAL from an order of the Court of Appeal (Jessel M.R. Lindley and Bowen L.JJ.) reversing the decision of Bacon V.C. (1).

The material facts are set out in the judgments of the Lord Chancellor and Lord Blackburn.

July 26, 27, 30. *Millar* Q.C. and *Rigby* Q.C. (*Stirling* with them) for the appellants:—

The respondent ought not to have employed a broker at all to obtain securities not dealt in on the market; but if he did he ought not to have trusted the broker with cash without seeing that he got his money's worth. The difference of opinion between Bacon V.C. and the Court of Appeal was one of fact not of law. The question is whether these were ordinary Stock Exchange transactions, or special transactions with the corporations themselves, in which case the payment ought to have been to the corporations alone. It was a breach of trust to invest in such securities payable to bearer, for the Local Loans Act 1875 (38 & 39 Vict. c. 83) s. 21 forbids a trustee to hold a debenture stock certificate payable to bearer unless authorized by his trust. The trustee is bound to shew that he has adopted the safest course, or at least a safe and reasonable course, and he must exercise reasonable care and diligence: *In re Bellamy and Metropolitan Board of Works* (2); *Ex parte Townsend* (3); *Ex parte*

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(1) 22 Ch. D. 727.

(2) 24 Ch. D. 387.

(3) 1 Molloy, 139.

Belchier (1); *Bacon* v. *Bacon* (2); *Joy* v. *Campbell* (3); *Massey* v. *Banner* (4); *Clough* v. *Bond* (5); *Bostock* v. *Floyer* (6); *Hopgood* v. *Parkin* (7); *Mendes* v. *Guedalla* (8). The absence of any charge for commission and of a date for the "account" or day of payment would have suggested to any ordinary man reading the bought-note that the loans were direct to the corporation; and the respondent was upon the evidence guilty of distinct negligence in paying the money to the broker. He was also negligent in leaving it so long in the broker's hands.

July 31. *Hemming* Q.C. and *Davey* Q.C. (*J. G. Wood* with them) for the respondent:—

The rule always has been that a trustee does his duty if he follows the ordinary course of business followed by a prudent man. The only pertinent case of a broker is *Matthews* v. *Brise* (9), where the trustee committed a clear breach of duty by leaving Exchequer bills in the hands of the broker after the transaction was perfected. It was not suggested that the broker ought not to have been entrusted with the money. The evidence here proves that in the ordinary course of business a prudent man pays the money to his broker. A broker instructed to get certain securities is thereby authorized to buy in the market or lend direct to the corporation, whichever is the cheaper; and he would not be bound to tell his customer which was the cheaper, nor would the customer be bound to ask him. A trustee need not be suspicious: but here there was nothing to arouse suspicion. One question is was the trustee guilty of "wilful default" within the meaning of Lord St. Leonards' Act 22 & 23 Vict. c. 35 s. 31, this being a loss which has happened through the default of a broker (one of the class there mentioned) with whom trust moneys were deposited. The Legislature clearly contemplated trust money being deposited with a broker. The bought-note would not have suggested to the respondent that the securities were not bought

(1) Amb. 218.
(2) 5 Ves. 331.
(3) 1 Sch. & Lef. 328, 341.
(4) 1 Jac. & W. 241, 247.
(5) 3 My. & Cr. 490, 497.
(6) Law Rep. 1 Eq. 26.
(7) Law Rep. 11 Eq. 74.
(8) 2 J. & H. 259.
(9) 6 Beav. 239, 243.

in the ordinary way on the Stock Exchange, for it did not suggest that to the appellants' counsel, who filed and amended their statement of claim without alleging this.

Aug. 2. *Millar* Q.C. in reply:—

The state of the respondent's mind at the time is not the test of his liability. He ought not to have employed a broker at all; and was guilty of want of reasonable care in not inquiring whether a broker was necessary. Having employed him he ought not to have paid him the money.

The House took time for consideration.

Nov. 26. Earl of Selborne L.C.:—

My Lords, the principles of equity, with respect to the duties and responsibilities of trustees, and the distinction between those losses of trust funds for which they are, and those for which they are not, liable, are so well settled, and are of such great general importance, that the present case, in which two Courts have differed as to their application, has naturally been considered by your Lordships with some anxiety.

In the early case of *Ex parte Belchier* (1), before Lord Hardwicke, it was determined that trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust, as, according to the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents; and that when, according to the usual and regular course of such business, moneys receivable or payable ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees, though the moneys are trust moneys; and that if, under such circumstances, and without any other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss. That authority has ever since been followed; and, in conformity with it, the statute 22 & 23 Vict. c. 35, s. 31, enacts, that every instrument creating a trust shall be deemed to contain a

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(1) Amb. 218.

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clause exonerating the trustees from liability "for any banker, broker, or other person, with whom any trust moneys or securities may be deposited."

Neither the statute, however, nor the doctrine of *Ex parte Belchier* (1), authorizes a trustee to delegate, at his own mere will and pleasure, the execution of his trust, and the care and custody of the trust moneys, to strangers, in any case in which (to use Lord Hardwicke's words) there is no "moral necessity from the usage of mankind," for the employment of such an agency. The cases of *Rowland* v. *Witherden* (2), *Floyer* v. *Bostock* (3), and many others, shew, that trustees, bound to invest trust moneys in authorized securities, are primâ facie answerable for the proper care and custody of such trust moneys, until they are actually so invested; and will not be exonerated from liability if, in the meantime, they leave them in other hands, though the hands of professional advisers or agents, to whose assistance, for many purposes connected with the trust, they may properly have recourse.

The present question is, whether the respondent, Mr. Gaunt, has been rightly exonerated, by the Court of Appeal, from liability for a sum of £15,275 trust money under the will of John Speight (who died in 1877), of which the respondent was trustee, and which he paid on the 24th of February, 1881, to a broker at Bradford, named Richard Ernest Cooke, for the purpose of a then intended investment? The burden of justifying this payment rests upon the respondent.

The facts which I consider material are these:—

In February, 1881, the respondent had in his hands, for investment, under Mr. Speight's will, that sum of £15,275, and he decided upon investing it in securities of three municipal corporations, those of Leeds, Huddersfield, and Halifax; dividing it between them as equally as he could.

The residence of the testator, and of his widow and children, who were the cestuis que trust under his will, was at Bradford. The respondent was a woollen spinner and cloth manufacturer residing at Stanningley, about half way between Leeds and Bradford, and having a place of business in each of those towns, which he was in the habit of visiting from time to time, usually on market days.

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(1) Amb. 218.

(2) 3 Mac. & G. 568, 574.

(3) 35 Beav. 603, 606.

The will of the testator authorized the investment of his trust funds in the securities of municipal corporations; and the corporations of Leeds, Huddersfield, and Halifax were in undoubted credit. The respondent knew, generally, that municipal corporations, of the class to which these belonged, were in the habit of borrowing money; and he believed that securities of these particular corporations would be obtainable, either in the market, or directly from themselves. Further than this, and that he was able to judge of the credit and character of the corporations, he had no knowledge on the subject; he had not looked at any share lists, or advertisements in newspapers, from which more particular information about it might have been obtained; he did not know which of the corporations were issuing securities at that time, or the particular form (whether stock or debentures) of their securities, or whether they could or could not be purchased in the open market (Questions 1182, 1415, 1571, 1577, 1582, 1591). He considered the business to be one of a kind which would be most conveniently and properly transacted through a broker; and if it had been on his own account, he would have transacted it in the same manner (Questions 1469, 1470, 1564). He accordingly employed for that purpose Richard Ernest Cooke, a stock and share broker at Bradford, who though young was then in good credit there, and who represented a firm of good standing (John Cooke & Son) employed by the testator as his brokers in his lifetime. He had been previously employed in selling securities of large value for the trust estate, and had, when so employed, properly discharged his duty. The respondent had no reason to distrust either the professional capacity, or the solvency, or the integrity of Richard Ernest Cooke. On the 18th of February 1881, he by letter informed Miss Lucy Speight, the testator's daughter, that he had "given Cooke instructions to purchase £15,000 worth of securities in Huddersfield, Leeds, and Halifax, £5000 to be invested in each corporation;" and this information was evidently intended to reach, and did reach, the other members of the family.

The instructions given by the respondent to Mr. Cooke were (according to his evidence, Questions 1413–1417) "to buy £5000 of Huddersfield, £5000 of Halifax, and £5000 of Leeds" free of commission"; which Mr. Cooke undertook to do, saying that he should be able to get his commission paid "by the other side." Being asked (Question 1414), "Did you tell him that you cared whether he got debentures, or debenture stock?" he answered, "No; I simply told him that we were going to invest in those corporations. I did not tell him what to get. I did not tell him where to buy, whether he was to buy them of the corporations themselves, or in the open market."

As a matter of fact (which Mr. Cooke ascertained by inquiry, but which was not known to the respondent) the corporation of Leeds was the only one of the three which had issued any debenture stock, though the other two were then borrowing money on debentures at 3¾ per cent. interest. The Leeds securities had been quoted, and to a large amount sold, upon the London and some country exchanges; but there was no similar market for those of the corporations of Huddersfield and Halifax, though they were sometimes applied for through brokers, in which cases a commission seems to have been allowed to the brokers by the corporations.

The course which would usually and properly be taken by a broker, acting under such instructions as those given by the respondent to Cooke, appears by the evidence of Mr. Rhodes, a Leeds stock and sharebroker Question 756, "When you are instructed to purchase any securities of this kind, what is the first step you take after you have negotiated for obtaining the securities?—(A.) We first ascertain if any are on the market, because they are always cheaper than getting them from the corporation thomselves. The seller must take less. If you can get them at 5½ premium from the corporation, the seller must take 5 premium." Question 757, "You buy in the market if you can?—(A.) We do so if we can." Question 764: "You use your discretion as a stockbroker experienced in the matter, to determine whether you will buy in the market, or buy of the corporation?—(A.) Yes." And he adds that having done that, he informs the client of what he has done, by sending him an "advice" or "bought" note.

In the present case Mr. Cooke saw the respondent in his piece-

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room at Bradford, on a day not exactly fixed by the evidence, but which was probably between the 18th and 22nd of February, 1881; and he gives the following account (Question 1427) of what then took place: "He said that he had arranged for these securities. He said I shall be some days yet, but I will let you know in time. I said the money is in the bank, and we do not want to lose any interest by taking it out before it is to pay. He said I will not come for it before I want it, but (he said) I cannot get Halifax, they are not issuing, and there are none in the market. He said the corporation are not borrowing themselves, and there is none in the market. I can get Stockton, which will pay you rather more interest than Halifax, if I can get them, and I think they will be quite as safe. I said, Very well; then buy Stockton." In my opinion nothing which passed at this interview was calculated to suggest to the respondent's mind any distrust of Cooke, if (as I think) he had no reason to distrust him before.

Nothing more took place till the 24th of February; when the respondent in the manner and under the circumstances stated in his answers to Questions 1428–39, 1452–56, and 1675–77, gave Cooke cheques for the money in question.

On that day Cooke came again to the respondent's piece-room, bringing with him an advice or bought-note, in the same form (except that "Stockton" debenture stock was mentioned in it instead of "Halifax") with that printed at page 219 of the Appendix. It was dated "Exchange, Bank Street, Bradford, Yorks., 24th February, 1881," was signed "John Cooke & Son," and was in these words: "To the executors of the late John Speight, We have this day bought for you, as per your order, subject to the rules of the London Stock Exchange" (so far in a printed form, except that the address, and the word "London" are in manuscript).

				£
£5000 Leeds Corporation Com. Debenture Stock, at 105½ net				5,275
£5000 Huddersfield	ditto	ditto	at 100	5000
£5000 Stockton	ditto	ditto	at 100	5000
				£15,275

The particulars are in manuscript.

The word "account" (printed) was added at the bottom, and there was a receipt by "J. C. & Son," with a proper stamp.

Cooke then said, "I want the money for these stocks; it is to pay to-morrow." In fact, if the transaction had been a real one, as represented on the face of the bought-note, the money would have been payable on the next day, the 25th February, which was the next account or settling-day on the London Exchange (Macmillan, Questions 451–55; Marshall, Questions 507–508; Cawthra, Question 1233). The respondent referred him to Mr. Musgrave, the accountant to the trust estate, as having the cheque book and all the other papers, and requested Cooke to go to him, and tell him to make out three cheques for the specific amounts, which Cooke was to bring back to the respondent for his signature, and to leave with Mr. Musgrave the bought-note, to be put among the other papers. Cooke accordingly went to Mr. Musgrave's office, and in about ten minutes returned with the cheques, made out by him as directed, which the respondent signed. In this way Cooke was enabled to obtain, and did obtain, the money, which he embezzled, no stocks or securities of any of the corporations having been in fact purchased by him. Cooke had left with Mr. Musgrave, not the same bought-note which he produced to the respondent, but another which (without the knowledge either of the respondent or of Mr. Musgrave) he substituted for it, in which the only difference was that £5000 "Halifax," instead of £5000 "Stockton" stock was represented to have been purchased. Upon this substitution nothing, in my opinion, turns.

Cooke presented a petition for liquidation on the 28th or 29th of March, and it was not until then that the respondent became aware of the fraud which he had committed. The first point requiring consideration is, whether the payment of the £15,275 to Cooke, on the 24th February, was a breach of trust? That depends upon two questions, (1) whether it was proper for the respondent, as a trustee, to use the agency of a broker for the purpose of the intended investment, and (2), whether (if so) the payment of the money to the broker so employed, under the circumstances of this case, was justified upon the principle of *Ex parte Belchier*? (1).

I think that, when an investment of trust moneys is proper to be made upon securities which are purchased and sold upon the public exchanges, either in town or country, the employment of a broker for the purpose of purchasing those securities, and doing all things usually done by a broker which may be necessary for that purpose, is primâ facie legitimate and proper. A trustee is not bound himself to undertake the business (for which he may be very ill qualified) of seeking to obtain them in some other way; as, for example, by public advertisement or by private inquiry. If he were to do so, he might, in many cases, fail to obtain them upon the most favourable terms. Securities of English municipal corporations are from time to time bought and sold upon the London and some other exchanges. The evidence in this case shews that the 4 per cent. debenture stock of the Leeds corporation was so bought and sold, and the respondent did not know, and had, in my judgment, no reason to know, that the securities of the other corporations also (whether they might be stocks or debentures) were not also so bought and sold. That was a point as to which he might properly and reasonably determine to avail himself of the superior means of inquiry and information which in the ordinary course of his business a broker would possess.

He was, therefore, in my opinion, entitled to give such instructions to a competent broker as he actually gave to Cooke in the present case, under which, if the securities in question were procurable by purchase on the exchange, the broker might be expected so to procure them: and if he procured them in any other way he might also be expected, in the ordinary course and due performance of his duty, so to inform his principal. It is probable that securities of municipal corporations might be obtained more easily than some others by private inquiry, and perhaps with less probability of their being procurable through a broker on better terms; but I should think it dangerous, and not justified by any sound principle, to hold that the duties and responsibilities of trustees, in respect of such investments (when duly authorized) vary according to the greater or less facility of obtaining them in one way or another in each particular case.

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(1) Amb. 218.

Thinking, therefore, that the employment of Cooke as a broker in this case, under the instructions actually given to him, was proper, and not inconsistent with the duty of the respondent as trustee, the next subject of inquiry is, whether it was a just and proper consequence of that employment, according to the principle of *Ex parte Belchier* (1), that the trust money should pass through his hands.

Upon this point I must first observe, that the case appears to me to be different from what it would have been if Cooke had entered into contracts with the several corporations for direct loans to them by the respondent, and had reported to the respondent that he had done so. The agency of a broker, as such, is not required to enter into a contract of that kind; and if the agency of a person who happens to be a broker is, in fact, employed to do so, I do not perceive why the consequences should be different from what they would be if a solicitor or any other person had been employed. The transaction could not be governed by the rules or usage of the London or any other exchange. There would be no moral necessity, or sufficient practical reason, from the usage of mankind or otherwise, for payment of the money to the agent; there would be no difficulty or impediment, arising from the usual course of such business, in the way of its passing direct from the lender to the borrower, in exchange for the securities; and if it should be found convenient to send it by the hand of a broker, or of any other messenger or agent, this might be done by a cheque made payable to the borrower or his order, and crossed, as is usual in direct dealings between vendor and purchaser, debtor and creditor, when payments of considerable amount have to be made. I think it right not to withhold the expression of my opinion, that such a case would fall within the principle of *Rowland* v. *Witherden* (2), and *Floyer* v. *Bostock* (3), rather than that of *Ex parte Belchier* (1). On this subject I find myself in agreement with Bowen, L.J.;

(1) Amb. 218.

(2) 3 Mac. & G. 568, 574.

(3) 35 Beav. 603, 606.

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nor do I infer, from the judgments of Lindley, L.J., and Sir George Jessel, that either of them thought otherwise.

If, however, the respondent—being justified (as I think he was), in the employment of Cooke in the way in which he employed him—was entitled to give credit to the representation made on the face of the bought-note which he received from Cooke, and to act upon the faith of it, the rules and usage of the London Stock Exchange are material; and the payment to the broker, if made conformably to such rules and usage, was no breach of trust, and was not at the respondent's peril. The whole evidence satisfies me, that the usual and regular course of business on the London Exchange is, for the money, under such circumstances, to pass through the broker's hands. The Bradford brokers, Marshall, Macmillan, and Gaskell (Questions 445–451, 538, 539, 1020, 1021); the Leeds brokers, Williamson and Rhodes (Questions 741–750, 890–896); the London broker Carr (Questions 637–645, 717–721), and Musgrave, the accountant to the trust estate (Question 1147); witnesses called, some on one side, and some on the other,—are all substantially agreed in this; and their evidence is consistent with what your Lordships may perhaps think within your judicial cognizance, from the case of *Nickalls* v. *Merry* (1) in this House, and other cases, in which the rules, customs, and usages of the London Stock Exchange have come in question before Courts of law and equity. In such transactions, on the London and other exchanges, the brokers are personally liable for the fulfilment of their contracts.

Unless, therefore, it can be shewn that the respondent was not entitled to give, or did not in fact give, credit to the bought-note, as a representation made by the broker (whose good faith he had then no reason to suspect) that the securities in question had been bought upon or under the rules of the London Stock Exchange, the just and reasonable conclusion from the evidence is, that he was justified in paying the money, as he did, to Cooke.

The bought-note has been made the subject of close professional criticism by brokers examined as experts on the part of the appellants; and some of the respondent's witnesses of the same class also regarded it as in some respects irregular. But their evidence does not lead me to the conclusion that there was any irregularity, patent and obvious to an ordinary man's understanding, on the face of the document, sufficient to be notice to the respondent that it could not, or did not, mean what it appeared expressly to say; or that there had been, or was likely to be, any deviation by Cooke from the proper and ordinary course of business. One of the respondent's witnesses (Rhodes, Question 770) said that the custom, when brokers were instructed to purchase corporation securities of this kind, was always to send out the bought-note "in the same form," whether they bought in the market or of the corporation. But the respondent is not shewn to have been aware of any such custom, or of any other reason for taking the words of the document otherwise than in their natural sense. The word "London," inserted in manuscript, could not have been meant, by any one dealing bonâ fide, as a mere matter of form. Mr. Rhodes himself, and Mr. Musgrave (Questions 783, 784; 1131), were agreed that there was nothing to excite suspicion on the face of the document; nothing to suggest to a prudent man that he ought to hesitate about paying over the money or that it would be dangerous or irregular to do so. The respondent said (Questions 1442–1444) that, as far as he knew or could judge, it was a regular document.

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(1) Law Rep. 7 H. L. 530.

Some stress was laid by the appellants' counsel upon an admission, which was very frankly made on cross-examination by the respondent (Questions 1678—1684), that he "would have drawn the cheques in the same way even if he had known that the purchase had been one direct from the corporation." If, in that supposed case, he had actually done so, I have already said that he would, in my opinion, have incurred peril from which he now escapes. But the fact that he might have failed to make a distinction necessary for his safety in a case which, according to the information given to him by his broker, did not happen, is no reason why a Court of justice should not make that distinction in his favour, if what he did was justified under the actual circumstances of the case.

It remains to be considered whether the respondent is liable, on the ground of wilful default, for his omission to take any active measures between the 24th of February and the 28th or

29th of March, 1881, to obtain from Cooke the transfers or documents of title, which (if the purchases had really been made, as represented by the bought-note), Cooke, or his London broker, ought to have received, in exchange for the money, from the sellers of the securities.

I prefer to rest my judgment, as to this part of the case, on the facts, so far as they were or ought to have been, during that interval, within the knowledge of the respondent, rather than upon the evidence given by Mr. Musgrave that Cooke was, during the whole of that interval "irretrievably insolvent," so that nothing could, by any diligence, have been recovered from him.

As to what the respondent did during that interval, the evidence stands thus. He was told by Cooke, on the evening of the day on which the money was paid (about two or three hours after the cheques were given), that he had "sent the money to the proper parties," and that he could not, at that time, tell when the respondent might expect to have the securities. On two or more subsequent market days, the respondent made inquiries after the documents directly from Cooke, or through Charles Speight (one of the cestuis que trust), with a view to get them, and "put them in the safe along with the other mortgage deeds." (Questions 1460–1467). Cooke said (on the 28th of February) that "they had not come yet; there had not been time;" and that "he could not tell when they would be there; they took some time to make out." The respondent was asked in cross-examination (Questions 1693–1695), "After you had parted with the money you held nothing in your hands. When did Cooke tell you that he would obtain the certificate or receipt from the corporation?" He answered, "As soon as it was ready;" and (to subsequent questions) that Cooke said he could not tell how long it would be; "it might be a fortnight, or three weeks."

The usual course in such cases seems to be, for the purchaser's broker, after receiving the transfer deeds in exchange for the purchase-money, afterwards to see to the registration of the transfers in the books of the corporations, and to obtain from them the proper certificates; for which purpose he must necessarily in the meantime retain the transfer deeds in his own hands. It appears from Mr. Rhodes' evidence (Questions 815–817, 833–849) that, when such securities are obtained directly from corporations, the completion of the formal documents of title usually occupies from three to four weeks; and I see no sufficient reason for supposing that the delay would be greater in that case than when the securities had been bought in the market.

If there had been, in fact, proper transfers executed, and duly received in exchange for the purchase-money, the trust estate would have suffered no loss or prejudice from this delay; and the question, therefore (as I view it), is, whether the answers made by Cooke to the respondent's inquiries, and the fact of the non-delivery of the securities before the 28th or 29th of March, ought to have roused the respondent's suspicions, and to have put him at some time before that date on taking active proceedings against Cooke? He swears that he did not suspect, and that he had no grounds for suspecting, that anything was wrong, till Cooke's insolvency became known, when it was too late to recover the money; and I cannot discover in the evidence any reason for disbelieving him. If he is not liable on other grounds, I cannot hold him liable merely for believing that such an interval or delay as took place between the 24th of February and the latter part of March might be no more than it was proper or reasonable to allow, in the ordinary course of such business, for obtaining from the corporations the proper evidence of title.

The result is, that I agree in the conclusion arrived at by the Court of Appeal; and I must move your Lordships that the present appeal be dismissed with costs.

LORD BLACKBURN:—

My Lords, the question raised before this House is, whether the order of the Court of Appeal, so far as it varied the judgment of the Vice-Chancellor, is right. The Vice-Chancellor had declared that the now respondent, Isaac Gaunt, had committed a breach of trust with reference to the sum of £15,275, and was bound to make good the loss, and ordered him to pay it into Court and to pay costs. The Court of Appeal ordered that so much of the judgment below should be reversed, and that so much of the action as prayed for special relief against Isaac Gaunt should be dismissed out of Court, Isaac Gaunt's costs to be paid out of the trust estate.

The case is of importance to the parties as involving a very considerable sum of money. It is also of general importance, so far as the application of the principles, on which the Court acts in respect to the liability of trustees to make good losses of trust funds, to the facts disclosed by the evidence, will be an authority in future cases. After some consideration, and reading the evidence, I have come to the conclusion that the judgment appealed against is right, and should be affirmed.

I do not think that there is any doubt as to the state of facts existing on the 17th of February, 1881, when Mr. Gaunt began the transactions in which it is alleged that he was guilty of a breach of trust.

The testator, John Speight, of Bradford, was a stuff manufacturer, and he had in his lifetime made some investments, and both bought and sold stocks, in doing which he had been in the habit of employing John Cooke & Son, a firm of stockbrokers in Bradford. John Cooke had long carried on that business; he had latterly taken into partnership his son Richard, a young man (whose dishonesty has given rise to the loss in question); and the new firm which, after the death of John Cooke in 1877, consisted of Richard only, carried on the business, which seems to have been one of the best in Bradford.

The testator died in 1877, leaving a considerable property, and by his will left it all to Isaac Gaunt and another (whom I need not afterwards allude to) upon trusts which required the trustees, amongst other things, to convert the funds into money, and to invest the moneys in the names of his two trustees on certain securities mentioned. There was a power given to permit any money which at the time of his death should be invested to remain in its then present state of investment as long as the trustees thought expedient.

Isaac Gaunt was also a stuff manufacturer. He had sometimes bought stocks for investment for himself, in which cases he had employed Messrs. Rhodes & Rayner, stockbrokers of Leeds. He had no special knowledge on the subject of investments, and the testator must have known he had none.

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The children of the testator were all minors, and Mr. Gaunt accepted the trust, which seems to have been a troublesome one, out of regard to his friend's family. It was perfectly gratuitous on his part. I do not think this prevented it from being his duty, since he accepted the trust, to exercise proper care about its execution, nor prevented his being responsible for any loss sustained in consequence of his neglecting to do so. But I think where a person is to be remunerated for what he does, he ought not to accept the employment unless he has competent knowledge and skill in the business he is to transact, and may properly be held liable if he proves deficient in either. I do not think that a person requested gratuitously to accept a trust, involving in it incidentally the conversion of investments into money and the reinvestment of the money, is under any obligation to have more knowledge or skill as to the business of converting property into money, and investing money in stocks and shares, than that which the testator knew him to possess when he selected him as his trustee. The fact that Mr. Gaunt had no special knowledge on the subject furnished an additional reason why, besides using all the knowledge and skill he had, he should employ a stockbroker; perhaps he might be excused if he was deceived by that stockbroker, when a man more conversant with that business would not have been deceived. I do not think it makes any further difference in his duty and responsibility, and I do not think it necessary for the decision of this case to say whether it makes even that difference.

Charles Speight, the eldest son of the testator, came of age in October, 1880, and a considerable part of the trust estate had then to be paid to him. Mr. Gaunt seems to have intended to retire from the trust on Charles coming of age, and hand it over to Charles Speight and some other trustee to be selected by the family, and, with a view to all this, he took steps to convert into money those investments which had been made by the testator in securities not such as were authorized by the will. For this purpose he thought it necessary to employ a stockbroker, and instead of employing his own stockbrokers, Rhodes & Rayner, he employed John Cooke & Son, who had been the stockbrokers employed by the testator. The work was properly done, and a considerable sum, apparently more than £10,000, was realized and collected and paid by John Cooke & Son. This, and the other cash belonging to the trust, was paid into an account opened in the name of the trustees in the Bradford Banking Company. This was a proper place in which temporarily to deposit any moneys belonging to the trust whilst looking out for investments such as were authorized by the trusts of the will. And Mr. Gaunt suffered it to remain there, apparently intending to leave it to the new trustees to choose the investments.

At the earnest request of the family, evidenced by a letter from the widow (Appendix, p. 209), Mr. Gaunt consented to continue to act as trustee. He then thought, and rightly thought, that the money should not be left in the bank at low interest, but should be invested in securities such as would give a higher rate of interest, and were authorized by the terms of the trust. He thought that Leeds, Halifax, and Huddersfield, were corporations that were good to lend the money to, and that securities of those corporations could be obtained. In all this he was quite right, and whether he had or had not talked it over with the Speight family is not material. He resolved to employ John Cooke & Son (that is Richard Cooke) as stockbrokers to procure securities of those three corporations to the extent of £5000 each. It was said, though I think it was not much relied on, that supposing him to be justified in employing a broker at all, he ought not to have employed Richard Cooke, who as it has turned out, had secretly indulged in speculative transactions of his own, which proving unsuccessful exposed him to great temptation, and who, as it turned out, was so dishonest as to yield to that temptation, and obtain from the trustees the money in question by false pretences and convert it to his own use. And I quite agree that, if Mr. Gaunt had known this to be the position and character of Richard Cooke, it would have been wrong to employ such a man. But it appears that Mr. Gaunt originally employed John Cooke & Son to sell the trust property which had to be sold, in preference to Rhodes & Rayner, who were his own brokers, because the testator had employed that firm, which was a good reason for giving that firm a preference; Richard Cooke having satisfactorily transacted the sales, which seem to have been to a considerable amount, had established a fresh ground for confidence on his own account. The plaintiffs have been unable, though they have tried, to obtain evidence of anything which should have led Mr. Gaunt to the conclusion that Richard Cooke was not an honest man, or one who ought not to be trusted as far as stockbrokers are usually trusted. And it appears (Question 1176) that in the year 1880 he did a very large business.

The authorities cited by the late Master of the Rolls, I think shew that as a general rule a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own. There is one exception to this: a trustee must not choose investments other than those which the terms of his trust permit, though they may be such as an ordinary prudent man of business would select for his own money; and it may be that however usual it may be for a person who wishes to invest his own money, and instructs an agent, such as an attorney, or a stockbroker, to seek an investment, to deposit the money at interest with the agent till the investment is found, that is in effect lending it on the agent's own personal security, and is a breach of trust. No question as to this arises here, for Mr. Gaunt did nothing of that kind. Subject to this exception, as to which it is unnecessary to consider further, I think the case of *Ex parte Belchier* (1) establishes the principle that where there is a usual course of business the trustee is justified in following it, though it may be such that there is some risk that the property may be lost by the dishonesty or insolvency of an agent employed.

The transactions of life could not be carried on without some confidence being bestowed. When the transaction consists in a sale where the vendor is entitled to keep his hold on the property till he receives the money, and the purchaser is entitled to keep his money till he gets the property, it would be in all cases inconvenient if the vendor and purchaser were required to meet and personally exchange the one for the other; when the parties are, as is very often the case, living remote from each other, it would be physically impossible.

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(1) Amb. 218.

Men of business practically ascertain how much confidence may be safely bestowed, or rather whether the inconvenience and hampering of trade which is avoided by this confidence is too heavy a premium for insurance against the risk thus incurred. When a loss such as that which occurred in *Ex parte Belchier* (1) occurs from having bestowed such confidence, they doubtless re-consider all this; and when a new practice, such as that of making bankers' cheques payable to order and crossing them arises, as it has done within living memory, no doubt it is made use of in many cases to avoid incurring that risk, which was formerly practically inevitable. So that what was at one time the usual course, may at another time be no longer usual.

Judges and lawyers who see brought before them the cases in which losses have been incurred, and do not see the infinitely more numerous cases in which expense and trouble and inconvenience are avoided, are apt to think men of business rash. I think that the principle which Lord Hardwicke lays down is that, while the course is usual, a trustee is not to be blamed if he honestly, and without knowing anything that makes it exceptionally risky in his case, pursues that usual course. And I think that, independent of the high authority of Lord Hardwicke, this is founded on principle. It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are.

The question as it seems to me is whether Mr. Gaunt has done more than this.

It is to be remembered that in the state of things which existed in February 1881, Mr. Gaunt was not only authorized to invest in securities such as were authorized by the trust, but was bound to do so if he could.

For this purpose it was necessary to ascertain what securities of that sort could be obtained, and what were the most favourable terms, to make the bargain with those who furnished the securities, and when the proper time came to exchange the money for the documents of title to the securities. Stockbrokers professionally manage all this class of business, and the very large number of persons who pursue this trade is quite sufficient to shew that it is usual to employ them.

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(1) Amb. 218.

Something should now be said about the stock exchanges. The brokers in London first established a voluntary society who met in the Stock Exchange, so that London brokers who had been instructed to buy and brokers who had been instructed to sell might meet and make their bargains; then, with a view to economise business on the same principles as those which led the bankers to establish a clearing-house, rules of the London Stock Exchange were established, which from time to time have been improved and altered. It is unnecessary to say anything about the class of members of the London Stock Exchange who are jobbers, not brokers; nor as to the complicated and very ingenious system of tickets and novations by which this is worked out. A great deal will be found about them in the many cases which arose after the failure of Overend, Gurney & Co. as to the liabilities of jobbers. It is enough to say that a broker who has bought for the account and given in a ticket stating the name of the person to whom the transfer is to be made out is personally liable to pay, in exchange for the executed transfer deed, to the member who has become the holder of the whole or part of his ticket, and that as the person who has become holder of the whole or part of the ticket has by the rules ten days to get the transfers drawn up and executed, the broker must be prepared to pay on the pay day, but may not actually have to pay, and consequently cannot get the transfer till some time after.

This system has been found to work in practice so satisfactorily that not only are enormous sums paid on the account-day in London, but the brokers in those large towns, where the business is sufficient to make them what a witness calls "stock exchange centres," have established stock exchanges of their own with rules not identical with those of the London Stock Exchange but founded on the same principles. In a town like Bradford, where there are it seems only five stockbrokers, the numbers are not sufficient to have caused a stock exchange to be established. The brokers of Bradford do not, nor I suppose do any other provincial brokers, confine themselves to dealing with the other brokers of their own town, in which case their business would be very limited. The evidence of Mr. Marshall (Appendix 80, Questions 510, 511) shews that they do through agents utilise the stock exchanges in London or any other stock exchange centre.

Was then Mr. Gaunt justified in employing a stockbroker and giving him authority to procure the desired securities on the London Stock Exchange if that was the best way to get them? I think he was. It was argued by Mr. Millar that he was not; for that in fact the securities of the different corporations were not in the market, and could only be obtained by lending the money to the corporations; and that anyone could obtain from them the documents of which copies are in evidence and so learn that he had no more to do than make his offer, and when it was accepted pay the money into a bank named by the corporation, which was, Mr. Millar argued, so simple an operation that anyone could do it without a stockbroker at all. This is not quite accurate, for we know from the evidence that Leeds had issued a large quantity of debenture stock which from time to time was sold by the holders, and if sold would necessarily be sold somewhat below the price which would have to be given to the corporation, and therefore, as is explained by Mr. Rhodes (Question 756), it would have been proper to inquire if they were for sale on the market. But it is true that it was not likely that so large a quantity as £5000 would be got at once. We also know that Halifax and Huddersfield had no debenture stocks at all, though they had borrowed and were borrowing money on mortgages for a fixed term of years, which would be equally good securities. And though someone might be found who wished to transfer a mortgage not yet due, that would not be likely. But Mr. Gaunt did not know this: and there is neither principle nor authority for saying that he ought to have inquired, and might have learned, and is to be responsible for not doing so. For independent of the unreasonableness of requiring a trustee to leave his own business, and do part of what a stockbroker is generally employed to do, there would be great risk of a trustee missing the most profitable way of obtaining the investment, which a stockbroker would not. I think, therefore, Mr. Gaunt was justified in employing John Cooke & Son.

The instructions given were verbal, and though the word "buy" seems to have been used, I think it meant "procure," and so Cooke, who when he received his instructions, probably did not yet know that his own clandestine speculations were to turn out disastrous, or at all events did not then, as far as appears, intend anything dishonest, understood them. For he received his instructions on Thursday the 17th of February, and on the 18th wrote to each of the three corporations to inquire if they were issuing debenture stocks and on what terms. He received the answers from Leeds and Huddersfield, which were dated on the 19th, I suppose on Monday the 21st. The answer from Halifax was not written till the 22nd, and could not be received on the 21st. On the 21st Cooke called on Mr. Gaunt at his office in Bradford, which he visited on market days, which were Mondays and Thursdays. He told Mr. Gaunt that he had arranged about the securities but could not get Halifax, they were not issuing, and there were none in the market, but Stockton was. Mr. Gaunt said "Then buy Stockton," and asked when he, Cooke, would want the money. Cooke answered "In a few days," and would let him know. I do not know whether Cooke had yet made up his mind to commit a fraud or not. Mr. Gaunt's account of what then passed between them is to be found in his answers to the Questions 1426 and 1427. It is all that we have to go by, and I have no doubt is honestly and sincerely narrated, and is as accurate as any account of a conversation which took place some months ago can be. I draw the inference from it that Mr. Gaunt had not the least suspicion of Cooke's honesty or veracity, and that he thought that it was a matter of course, in the usual course of business, that when stocks bought through a broker had to be paid for, the broker was the person who was to pay the money to the vendor, and that the purchaser was to put him in funds to do so.

The account-day on the London Stock Exchange was the 25th of February. On Thursday the 24th, by which time Cooke must have known that his own clandestine speculations had proved disastrous, and that, unless he could provide funds on the 25th to meet the demands on himself, he was a ruined man, Cooke came again. There is no doubt that then he did not mean to act honestly, and that he then used false pretences to obtain the money from Mr. Gaunt, with intent to apply it for his own purposes. In that he was successful. Mr. Gaunt was deceived, and did put the money in his hands.

It is not suggested that Mr. Gaunt was not bonâ fide and honestly doing what he thought right. And in my opinion the whole question in the cause is whether it is made out that he neglected his duty as a trustee not to expose the property of his cestuis que trust to unusual risks so far as to be guilty of a breach of trust. And the answer to that question, according to the authorities cited, and as I think on principle, greatly depends on the evidence of what was, at that time, the usual course of business. The Vice-Chancellor seems to have thought that there was great negligence in acting on the belief that Cooke had bought these stocks on no better evidence than the word of Cooke and the production of an advice-note, which the Vice-Chancellor calls a scrap of paper.

I do not think an advice-note, however formally drawn up, is really anything more than the assertion of the broker that he has made the contracts. That assertion, if made in an advice-note, is made in such a shape as to be easily proved against him, but if he is prepared, as Cooke no doubt was, to lie, and say he had bought when he had not, it was as easy for him to draw out an untrue advice-note as to make an untrue verbal statement. Now I do not think that where a broker has really bought on the London Stock Exchange he has any document which he can shew to prove that he has done so. As far as I know, and certainly there is no evidence to the contrary in this case, the clients of a broker do not in the ordinary course of business require the production of anything else than the broker's advice-note. They act on the belief that the broker whom they have deemed trustworthy is not telling a lie. It is a more difficult question whether, believing that Cooke had made contracts on the London Stock Exchange, Mr. Gaunt was justified in handing over the money. To that I will return afterwards.

The Vice-Chancellor (I think assuming that Mr. Gaunt knew all that we now know about the stocks) comes to the conclusion that Mr. Gaunt must have known on the 29th of February that, if Cooke had made any arrangement at all, it must have been one to lend to the corporations, and that, if he had made such an arrangement, Mr. Gaunt, as a trustee, was, the Vice-Chancellor thinks, not justified in handing over the money to the broker, but ought, as he says, to have drawn cheques in favour of the corporations, by which I suppose he means to have made his cheques payable to the bankers named by the corporations. Now I have already said that I do not think that Mr. Gaunt knew what we now know, and I do not think there was any duty on him to learn what was to be learned about them so as to make him responsible as if he had known. And I agree with the whole three Judges of the Court of Appeal that the primâ facie inference which any one would draw from the form of the advice-note (accompanied by the verbal statement, which was true, that the 25th was pay-day, which was all that would have been stated if the blank after "account" had been filled up by inserting "25th February") was that Cooke stated that he had "bought."

If Cooke had really arranged with the corporations to lend to them, he might without any great irregularity have made out the advice-note as he did, and if Mr. Gaunt had thought it made any difference which way it was done, he might have asked. He was not, I think, called upon to be suspicious and ask, and it is evident that he thought, whichever way it was, the broker having made the bargain and being the person who was to superintend the payment, it was right that he should be put in funds to make it.

Now when a purchase has been made on the London Stock Exchange, it is necessary that the money should be ready in London, to be paid in exchange for the transfers, from the date of the settling-day till the transfers are all delivered, in order to keep the buying broker out of cash advance, and the evidence is, I think, that it is the usual course of business to do this by giving to the buying broker a cheque for the money, so that he may be in funds to take up the transfers when ready. If the broker appropriated the money to any other purpose it would be an act of dishonesty on his part, but all men may be dishonest; and even if he is not dishonest, there is a possibility that he may fail before the stocks are ready, and that the money advanced can be no longer recovered in specie. There is, so far, some risk incurred by trusting the broker for a few days with the money.

I will state the inference I draw from the evidence, referring to the numbers of the answers which have most weight with me.

All bankers, I believe, are willing to undertake for their customers the purchase or sale of stocks and securities on the London Stock Exchange. They find no difficulty in getting brokers to act for them in doing so, without any charge to the customer beyond what would be made by a broker acting for the customer without the intervention of any banker. I do not know in what proportions the banks and brokers divide the commission between them; but they do make some arrangement which is not popular amongst brokers.

Mr. Eastwood, who himself was the manager of a bank at Bradford, advised every one who sought an investment to employ a banker. This is not unnatural advice from a banker, though not that which a broker would give, and it is not generally followed; it is still very usual to employ brokers. He says that where (Questions 334–338) a local broker is employed, it would be the judicious course to take the advice-note to the purchaser's banker, and desire the banker to arrange with the broker that he should present the securities, when ready, at a bank, the correspondent of the banker in the town where the securities were to be taken up. That he always advised that course, and speaking up to 1878, when he ceased to be a banker, he says, "I have not had much experience with regard to local transactions. It is pretty general now, I think, in Bradford, with regard to London transactions. It is more general of late years than it used to be."

Mr. Rhodes, who for forty years was one of the principal brokers in Leeds, had never known an instance of this; and I draw the inference that such a practice, if not unknown, in local transactions is very unusual. Mr. Carr, a broker in London, of great experience in London, confirms Mr. Eastwood's evidence, that the course is sometimes adopted in London, but says (Questions 646, 647) that it is very rare that the money is left with bankers to pay the brokers as they deliver the stock, and gives as the reason that it is too cumbersome; and he (Question 717) explains how it is cumbersome by an instance in his own experience.

Mr. McMillan says that, except in very rare instances, it was, up to the time of Mr. Cooke's failure, usual to pay the money to the broker. He suggests, what I think is probable, that the confidence in brokers was shaken by that failure, and I think it very likely that until that confidence is restored there will be more caution, perhaps to the extent of vexatious timidity; and it may very possibly become unusual, at least where the sum is large, to pay, as Mr. Gaunt did in this case; and if the usage change, a trustee who should pay in this way after it had ceased to be usual so to do, may be responsible. As to that I give no opinion. But we must look to what was usual at the time he acted; and I think that the effect of the evidence is to bring the usual course very near to that which was the usual course in *Ex parte Belchier* (1). There the broker, who had sold the tobacco, might have brought the purchaser and the vendor together, and let the vendor receive the money in exchange for the dock warrants or whatever it was that represented the goods; the only reason why that was not usual was that it was cumbersome, not convenient, not that it was impossible. Yet Lord Hardwicke thought that the defendant was justified in following the usual course. And I agree with the judges of the Court of Appeal that Mr. Gaunt, without improper want of caution, might here believe that Cooke had bought on the London Stock Exchange and might put the money in his hands on the pay-day.

The judges in the Court of Appeal did not think it necessary to pronounce an opinion as to whether it would have been a breach of duty in Mr. Gaunt to pay the trust money into the hands of the broker, if it had been represented to him (as the Vice-Chancellor thought it was) that the transaction was one of loan negotiated with the corporations and not of purchase in the market. No doubt there are differences where that is the case. The broker who had negotiated a loan with the corporation of Huddersfield, for instance, would have a letter in the form printed (Appendix 211), and the client need not trust to his bare word; for that letter might be shewn to him. The broker also would not have come under any personal obligation to pay the money; and the time when it was to be paid would not be fixed, and, as soon as it was paid, the banker's receipt would be a good security for the money. If the client choose to pay the money through the broker (and in most cases he would wish to do so in order that the broker might save the client the trouble of seeing to the due making out of the securities, and also to entitle the broker to the commission paid by the corporations to brokers) he would, by giving his cheque to the broker, only give it to him to hand over at once to the banker, and would incur no further risk than if he had sent it by post or by messenger. And even that risk, which would be nothing if the broker was honest, might be much reduced by crossing the cheque to the bankers, to credit of the account directed in the letter from the corporation. If he did so, the broker could not appropriate the cheque, unless he was not only dishonest enough to steal, but bold and skilful enough successfully to commit forgery. I think the judges were right in thinking it not necessary to pronounce any opinion on what might have been the liability of Mr. Gaunt if he had believed, or ought to have believed, this to be the state of the case, for there was nothing to lead him to think it was the state of the case. I wish, however, to say that I am not to be understood as agreeing with the Vice-Chancellor on this. I do not think it necessary to form a final opinion on a point which does not arise.

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(1) Amb. 218.

LORD WATSON:—

My Lords, I entirely concur in the view which your Lordships have taken of this anxious and difficult case.

LORD FITZGERALD:—

My Lords, the case now before us presents for our consideration questions of the proper inferences to be deduced from the facts in evidence rather than difficulties in law. It is observable that the general law, so far as it was stated by the Vice-Chancellor, seems to have been accepted by the Court of Appeal, and your

Lordships have now laid down the principles of law which should govern the case, in a manner so full and clear as to leave nothing to be added.

I accept it then as settled law that although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may in the administration of the trust fund avail himself of the agency of third parties, such as bankers, brokers, and others, if he does so from a moral necessity or in the regular course of business. If a loss to the trust fund should be occasioned thereby, the trustee will be exonerated unless some negligence or default of his has led to that result. Then, looking at the trust before us and the intended investment of the trust fund, I concur in thinking that the trustee was entitled to employ a broker, and not the less entitled to do so even if he could have obtained the securities direct from the corporations without the intervention of a broker; but I must add that looseness and seeming carelessness characterise the conduct of the trustee in the absence of specific instructions to the broker, and in not withholding his final instructions until the broker had informed him what the specific securities were to be and how to be obtained. I think, too, that nothing has been brought home to the knowledge of the trustee which would have suggested to him that Cooke was an unfit person to be entrusted with the transaction, and it appears that the prior dealings with Cooke in reference to the same trust had been of a satisfactory character. There was much time consumed in criticism on the terms of the fabricated "bought-note" of the 24th of February 1881, but on the whole I think that the trustee was entitled to interpret it, as he appears to have done, in the language of Sir George Jessel, namely, "that the broker had bought those things for me on the Bradford Exchange, subject to the rules of the London Stock Exchange."

Then comes the difficult question in the cause which requires careful consideration and a most cautious decision: was the trustee justified in paying over the money to the broker in the manner and under the circumstances detailed in the evidence? Having got that paper called the bought-note, and such being its interpretation, Sir George Jessel asks a question which with

Lord FitzGerald.

the answer he gives deserves very grave consideration. He is represented to have said (1): "Now, if that were so, what is a trustee to do? It is suggested that he might have inquired whether the broker had actually bought them. Of whom was he to inquire? Surely not of the broker. Is it tolerable that a man should so far be bound to suspect his own broker as that he should be compelled to go on the Stock Exchange to find out from whom his broker had purchased, and then to inquire of him? Would it not be that the trustee would be informed by his broker, 'You treat me like a thief; I will have nothing more to do with you.' It is quite plain that no man in the ordinary course of business ever does anything of the kind . . . . He must rely in the ordinary course of business on the statement of his broker, and he pays the money to him on that statement. Well, that being so, I cannot see any ground whatever for saying that Mr. Gaunt was guilty of negligence. Then there is this allegation, that he did pay this sum of money on the credit of the existence of the stock to Mr. Cooke. Then it is said that no bonds or debentures were given by Mr. Cooke. Of course there were not. Then it goes on to say that no such securities as debenture stocks of Huddersfield and Halifax exist. Does that matter? I think not. It is quite true the representation was that there were such, and I think that that is the fair reading of it. But supposing it were so, Mr. Gaunt did not know it." He then goes on to say further: "I repeat therefore when Mr. Cooke told him he had bought debenture stock he would make no further inquiry as to whether such things existed or not . . . . It appears to me therefore that the fact of the non-existence of some of the securities has no bearing on the question;" and he concludes this portion of his judgment thus: "It seems to me, therefore, if you once arrive at the conclusion that Mr. Gaunt was informed by the bought-note that the purchase had been made in that way, there was no obligation on him to make any further inquiry. He trusted his broker, and he was not bound to ask the broker, Have you written me a falsehood? Have you entered into a contract or not?' The man told him in writing that he had, and he was entitled to trust him, and as it seems to me there was no obligation upon him to make any further inquiry."

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(1) Shorthand writer's notes of the judgments printed in the Appendix before the House.

It is with extreme diffidence that I venture to criticise the propositions of so eminent a judge, and one whose strong and keen intellect enabled him at once to brush aside all difficulties and reach the true point with unerring precision. This judgment of Sir George Jessel carries inherent evidence of having been delivered immediately on the close of the argument. My Lords, as you are about to affirm it, I feel called on to say for myself that Sir George Jessel seems to place a stockbroker at a greater elevation and as entitled to a greater degree of trust and credit than is ordinarily given to other agents, and to add that these wide propositions convey to me some degree of alarm for the security of trust funds which have to pass through a stockbroker's hands. They seem to me to attain to this, that if a trustee employs an apparently fit broker to invest trust funds, no matter how large the amount, he may act on the broker's representations and transfer the fund to him and may not, and indeed ought not, to make any inquiry.

It seems to me that the trustee before he paid over the money on the 24th of February into the hands of Cooke might well have made some inquiries from him which possibly might have led either to the detection of the fraud about to be perpetrated, or defeated it by either withholding the money for a time or taking some special steps to provide for its reaching the proper destination. Assuming the interpretation of the bought-note to be a purchase of these local securities in Bradford, but according to the rules of the London Stock Exchange, he might well have asked Cooke, "Have you dealt with the corporation direct, or from whom did you buy, and what did you buy? Who is to receive this money?" It is quite certain that Cooke must have answered these or any other such questions by additional falsehoods, but does it follow that each such falsehood would pass current and not lead to detection or precaution? If the answer had been, "I am to get the Huddersfield and Stockton securities from the corporations direct" (they were represented to have been obtained at par), the result might have been that the trustee would have insisted on the cheques being drawn in favour of these corporations. If the reply had been that they were bought in Bradford from local people or local brokers, what more natural than to say, "Then I will make the cheques payable to these people and you can hand them over to each on getting the proper transfers?" I will not pursue this further, for it may be that none of the replies would have excited any suspicion, but we ought not to be left to speculate on that. Then, upon a representation made the same day that the money was to be paid the next day, but without any inquiry as to why, or to whom, or where, the cheques are delivered over to Cooke, who forthwith misappropriates them. The breach of trust, if there was any, and the loss were then complete.

Upon the question whether there was a breach of trust in thus placing the trust fund in the hands of Cooke, I have hesitated very much, but my doubts are not so strong as to warrant me in dissenting. I am overborne by the weight of your Lordships' judgment affirming the decision of the Court of Appeal, and am coerced to concur, but with much hesitation.

There remains but one point, not pressed with much vigour, either in the Court of Appeal or before your Lordships, as to whether there was neglect of duty on the part of the trustee in not making due inquiry after the trust fund or the supposed securities in which it was to be invested, in the interval between the 24th of February, when the fund was parted with, and the 28th of March, when Cooke's insolvency became public and notorious. I shall pass over this very shortly. The money was represented to be required for payment on the 25th of February on the delivery of the transfers, but not until the transfers were delivered. There would then remain nothing to be done but to register the transfers, for as the alleged purchase was of debenture stock there would be no securities to be made out. The evidence has satisfied me that due diligence was not used, and that in allowing himself to be satisfied with the statement of Cooke "that he could not tell when the securities would be there, they

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took some time to make out," he was not exercising that care which a prudent and reasonable man ought to have exercised if the money had been his own. I do not think it any sufficient reply to say "that the loss was anterior to that negligence." Diligence even then might have reduced the actual loss. Even if my interpretation of the facts on this branch of the case is correct, it could only lead to an inquiry whether any and what portion of the lost money might have been recovered from Cooke by greater diligence. The plaintiffs have not asked for such an inquiry, for the probable reason that they are satisfied that Cooke was so utterly insolvent that nothing could have been got from him.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 26th November 1883.

Solicitors for Appellants: *Johnson & Weatheralls, for Rawson, George & Wade, Bradford.*

Solicitors for Respondent: *W. & J. Flower & Nussey, for Killick, Hutton, & Vint, Bradford.*

[HOUSE OF LORDS.]

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WILLIAM EWING AND OTHERS . . . APPELLANTS;

AND

MALCOLM HART ORR EWING (AN INFANT, BY GEORGE WELLESLEY HOPE, HIS NEXT FRIEND) . . . . RESPONDENT.

Administration—Jurisdiction of English Court over Scotch Assets of Testator domiciled in Scotland—Scotch Assets.

A testator domiciled in Scotland and possessed of a large personal and some heritable property in Scotland and of a comparatively small personal property in England, by will made in Scotch form appointed several persons to be executors and trustees, some of whom resided in England and some in Scotland. The trustees obtained a confirmation of the will in Scotland, and the confirmation was sealed by the English Court of Probate under 21 & 22 Vict. c. 56. An infant legatee resident in England brought by his next friend an action here to administer the estate, and the writ was served upon some of the trustees in England, and (under an order) upon the Scotch trustees in Scotland. The trustees appeared without protest and took no steps to discharge the order, but obtained an order of reference to inquire whether the further prosecution of the action would be for the benefit of the infant plaintiff; upon which an order (not appealed from) was made for the further prosecution of the action. The trustees removed all the English personalty into Scotland before the action came on for trial:—

Held, affirming the decision of the Court of Appeal, that the English Court had jurisdiction to administer the trusts of the will as to the whole estate, both Scotch and English; and that as no proceedings were pending in a Scotch Court (if such were possible) by which the interests of the infant plaintiff could have been equally protected, the jurisdiction was not discretionary, but that the decree was a matter of course.

The dicta of Lord Westbury in *Enohin* v. *Wylie* (10 H. L. C. 1) disapproved.

APPEAL from an order of the Court of Appeal (Jessel M.R. Cotton and Bowen LL.J.) reversing an order of Manisty J. (1) and ordering an administration of the trusts of the testator's will and codicils with the usual accounts and inquiries.

The material facts are stated in the judgment of the Lord Chancellor. They are also set out in the report of the decision below (1). To that report it should be added that when the action began there still were in England about £2700 out of the £25,000 odd of English assets, but before the trial the whole of the English assets had been removed into Scotland.

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(1) 22 Ch. D. 456.

Nov. 19, 20, 21. *The Lord Advocate* (*Balfour* Q.C.) and *Whitehorne* Q.C. (*Davey* Q.C. and *Maclean* with them) for the appellants:—

The English Court had no jurisdiction to administer the trusts, at all events as to the Scotch estates. The Scotch confirmation gave power to administer the estates both Scotch and English, and constituted the trustees officers of the Scotch Court and accountable only to the Scotch Court. A Scotch confirmation is not merely probate or a taking up of the succession, but is historically and practically an administration of the trusts of the will under the eye of the Court; Erskine, Principles, book 3 tit. 9. The right to administer is conferred by the confirmation, which is the primary or principal administration; the sealing in England under 21 & 22 Vict. c. 56 ss. 9, 12 and 15 being merely ancillary. The jurisdiction is territorial. The Scotch Courts clearly have jurisdiction to administer the trusts of the Scotch estates, and it would be most inconvenient and lead to a conflict of laws if the present action is allowed. Primâ facie the administration of movables of a testator or intestate is confined to the country where the movables are: *Preston* v. *Melville* (2); *Enohin* v. *Wylie* (3) per Lord Westbury; the only decree affirmed by this House in that case being the decree relating to English assets; *Gillon & Co.* v. *Dunlop & Collett* (4) (per Sir H. Cairns' opinion); *Eames* v. *Hacon* (5); *Pipon* v. *Pipon* (6). *Johnstone* v. *Beattie* (7) has always been considered a very doubtful decision: and is explained in *Stuart* v. *Lord Bute* (8). Scotland for this purpose is a foreign country notwithstanding what was said below by Jessel M.R. The English Court has no jurisdiction to administer a purely Scotch trust: 2 Tud. L. C. Eq. 959 (5th ed.) notes to *Penn* v. *Lord Baltimore*. The fundamental principle is that the law and forum of the domicil is the law and forum of the administration of the will. Where there is an asset in a foreign country the trustee's duty is to collect, pay duties and debts in the foreign country, and remit the clear balance to the country of the domicil: Story, Conflict of Laws, ss. 512, 518, 524, 525; *Innes* v. *Mitchell* (1); *Meiklan* v. *Campbell* (2); *Wallace* v. *Attorney-General* (3); *Attorney-General* v. *Campbell* (4); *Cresswell* v. *Parker* (5). *Stirling-Maxwell* v. *Cartwright* (6) should not be followed.

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(1) 22 Ch. D. 456.

(2) 8 Cl. & F. 1, 14.

(3) 1 D. F. & J. 410; 10 H. L. C. 1.

(4) 2 Court Sess. Cas. 3rd Series, 776, 778.

(5) 16 Ch. D. 407; 18 Ch. D. 347.

(6) Amb. 800.

(7) 10 Cl. & F. 42.

(8) 9 H. L. C. 440.

But if there was jurisdiction, it is discretionary, and should not have been exercised. The administration in England of Scotch estates, involving large payments and other details of management, is most inconvenient, as well as novel. Most of the trustees being in Scotland they could be sued there, and all the trusts administered there. The English Court should not interfere unless it can give a more perfect remedy or can try the case with a more perfect procedure: *Ochsenhein* v. *Papelier* (7).

The House took time for consideration;

Rigby Q.C. *Romer* Q.C. and *Fellows* for the respondent, being informed that notice would be given if the House desired to hear them.

Nov. 30. EARL OF SELBORNE L.C.:—

My Lords, the plaintiff in this action, Malcolm Hart Orr Ewing, an infant under the age of twenty-one years, is entitled to one sixth share of a pecuniary legacy of £60,000, and also to one sixth share of the general residuary estate, under the will of a Scotch testator named John Orr Ewing, who died in 1878. The testator was at the time of his death domiciled in Scotland, and left personal estate in Scotland exceeding £435,000, and in England exceeding £25,000; and I assume for the present purpose that he had also some heritable property in Scotland, though of what value does not appear. By his will the testator appointed the six appellants (two of them described as "merchants in London" and the rest as residing or carrying on business in Scotland) to be his executors; and he assigned and disponed to them, as trustees for the purposes of his will, all his real and personal estate. The trusts (after payment of debts, &c.) were to pay an annuity to his widow, and certain legacies, including the legacy of £60,000 already mentioned; and subject thereto to realize and convert into money the whole residue, and to hold and apply the same for the benefit of the children of his brother James Ewing (six in number, of whom the plaintiff is one), in the manner and subject to the powers and provisions therein mentioned. There were two codicils, but nothing in them is, in my judgment, material.

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(1) 4 Drew. 57, 141, 144; 1 D. & J. 423.

(2) 24 Beav. 100.

(3) Law Rep. 1 Ch. 1.

(4) Law Rep. 5 H. L. 524.

(5) 11 Ch. D. 601.

(6) 9 Ch. D. 173; 11 Ch. D. 522.

(7) Law Rep. 8 Ch. 695.

The infant plaintiff, Malcolm Hart Orr Ewing, was, in February, 1880, residing with his mother in England; and an action was then commenced in his name (and in the names of two of his brothers, also then infants) by Mr. George Wellesley Hope, as their next friend, in the Chancery Division of the High Court of Justice in England, against the appellants, for the administration of the testator's estate. The appellants were all duly served (three of them in England, and the other three in Scotland under an order which they did not seek to discharge), and they all duly appeared to the action. They obtained, on motion, an order of reference to inquire whether it would be for the benefit of the infant plaintiffs that the action should be further prosecuted; and the late Master of the Rolls (discharging a certificate against its further prosecution which had been made by his Chief Clerk) determined that the action was for the benefit of the infant Malcolm Hart Orr Ewing, but that the other co-plaintiffs ought not to have been joined with him; and by an order dated the 21st of March, 1881 (which has not been appealed from), he directed the writ to be amended by striking out the names of those co-plaintiffs, and the action to be carried on and prosecuted solely by the infant Malcolm Hart Orr Ewing, by Mr. Hope, as his next friend, against the defendants.

On the 18th of February 1882, the action came on for trial before Manisty J., who made an order, staying all further proceedings (except as to certain costs), on the grounds "that the testator was domiciled in Scotland; that there were no debts remaining unpaid in England; and that the whole of the personal estate of which the testator was possessed in point of fact in England had been transferred to Scotland, and was then in the hands of the defendants as his legal personal representatives in Scotland." The Court of Appeal (Sir George Jessel M.R., Cotton L.J. and Bowen L.J.) on the 29th of November 1882 reversed that order, and made a common administration decree for the execution of the trusts of the will, and for ordinary accounts and inquiries, as to the whole personal and real estate.

This appeal is brought from that decree; and the appellants have contended that, by virtue of the confirmation of the testator's will in Scotland, as that of a domiciled Scotchman (under the statute 21 & 22 Vict. c. 56), they became officers of a Scottish Court, accountable and amenable only to the Courts in Scotland, so far, at all events, as relates to that part of the estate which was locally situate in Scotland; and that the High Court of Justice in England had no jurisdiction to make a decree for the execution of the trusts of the will as to any part of the Scottish personal or real estate. They contended, further, that if the English Court had such jurisdiction, it was discretionary, and ought not to have been exercised.

The argument from the official character of the appellants, by reason of the confirmation of the will by a Scottish Court, may be summarily dismissed. The effect in that respect of confirmation in Scotland (or of probate in England) is, and must be, the same, whatever may be the domicil of the testator. It is merely to complete the title of the executors to represent their testator within the local jurisdiction, in mobilibus; and the necessity for this is independent of domicil. Those special provisions of the statute, in which a Scotch domicil is mentioned, affect the inventory only, and not the character of the title obtained by confirmation. The Scottish confirmation requires to be, and in the present case it was, sealed by the English Court of Probate;

which sealing under the statute has the same operation as if probate had been granted by the English Court. The appellants, therefore, now represent their testator in mobilibus within both jurisdictions; and, under the will, they are trustees, not of part only of the estate, but of the whole. The Court which grants confirmation or probate is not a Court of administration, though (when there are no executors nominated by the will) it may appoint administrators: nor are the executors (in any sense exclusive of the jurisdiction of any other forum, in a case in which it might otherwise attach), officers of that Court.

With respect to domicil, it is familiar law that the succession to the moveable estate of a deceased person is governed by the lex domicilii. But that law does not prescribe the forum in which the persons beneficially entitled to the succession may pursue, against the trustees in whom the estate is vested, their proper remedies. The proposition, that the Courts of that country only in which a testator dies domiciled can administer his personal estate, is without support from any authority, except certain dicta of Lord Westbury in *Enohin* v. *Wylie* (1), with which the other Lords who decided that case did not agree. If it were true, it must extend (as Lord Westbury extended it) to the *whole* moveable estate of the deceased person, wheresoever situate, on the principle "mobilia sequuntur personam." This was not seriously contended for at your Lordships' Bar.

Much of the appellants' argument proceeded upon the fallacy that, because confirmation is necessary in Scotland, and probate (or its statutory equivalent) in England, to clothe executors with the character in each of those parts of the United Kingdom of legal personal representatives of their testator, and because that particular character so acquired is local and territorial, therefore they ought to be regarded in England as having no duty, office, or character, except that which the English Court of Probate was able to and did confer. But by the mere fact of taking out probate, executors, who are also trustees, accept the trusts of the will, as well as the office of legal personal representatives; and the acceptance of those trusts extends to the whole property which, under the terms of the will, is the subject of the trust, real as well

(1) 10 H. L. C. 1.

as personal, although the real estate cannot be, and part of the personal estate may not be, within the jurisdiction of the Court of Probate.

It would be contrary to the nature of such trusts as those of the residuary estate in the present case to attempt to execute them by piecemeal, with reference to the different species and local situation of the several constituent parts of that estate which the testator has aggregated together (see *Innes* v. *Mitchell*) (1).

Another fallacy of the appellants' argument consisted in a comparison of the present case to one in which there might be a limited administrator in England of English assets only, and other persons in Scotland, appointed by the testator's will to be his executors in that country, and also trustees of his general estate. If in such a case a suit for accounts and administration were instituted in England against a limited administrator, he could only be made to account for his own intromissions, and for any outstanding English personal estate; and it might very well happen that if a surplus of English assets remained after the payment of all debts, &c., the English Court might order such surplus to be paid over to the Scottish trustees, as the proper persons to receive it under the testator's will. But the comparison leaves out of sight the identity in this case of the trustees with the legal personal representatives in both countries, and the unity of the trust which they have to perform.

These arguments failing, the jurisdiction of the English Court is established upon elementary principles. The Courts of Equity in England are, and always have been, Courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or ratione domicilii within their jurisdiction. They have done so as to land, in Scotland, in Ireland, in the Colonies, in foreign countries : *Penn* v. *Baltimore* (2); and see the notes to that case in 2 L. C. Eq., 4th ed. pp. 939, 940, 941.

A jurisdiction against trustees, which is not excluded ratione legis rei sitæ as to land, cannot be excluded as to moveables, because the author of the trust may have had a foreign domicil; and for this purpose it makes no difference whether the trust is constituted inter vivos, or by a will, or mortis causâ deed. Accordingly it has always been the practice of the English Court of Chancery (as was said by James, L.J., in *Stirling-Maxwell* v. *Cartwright* (1)) to administer, as against executors and trustees personally subject to its jurisdiction, the whole personal estate of testators or intestates who have died domiciled abroad, by decrees like that now in question. The appellants' counsel were not able to produce any precedent for an administration decree limited (where there was a general probate and a general trust) to assets locally situate within the jurisdiction. They admitted the authority of *Stirling-Maxwell* v. *Cartwright* (1) to be against them. Two of the judges who decided that case, as well as two of those who decided the present case in the Court of Appeal, had great knowledge and experience of Chancery practice. The English jurisdiction was sustained on the same principle in *Johnstone* v. *Beattie* (2). If English trustees, having in their hands English trust funds, were found within the jurisdiction of the Scottish Courts, those Courts, upon the same principle, might compel them to do their duty (*Ferguson* v. *Douglas* (3)).

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(1) 4 Drew. 98.

(2) 1 Ves. Sen. 444.

In the present case the infant plaintiff when this suit was brought resided in England; and three of the appellants, his trustees, were also locally within the English jurisdiction. The others were made parties to the action by lawful process, which they did not seek to discharge. By the law of England the plaintiff had a right (through his next friend) to seek the aid of the High Court, for the purposes for which this action was brought, against his trustees. He became by so doing a ward of that Court, and was entitled to have his share of the trust property ascertained and secured. The decree made was, for that purpose, proper and usual.

It was argued, however, that, although the Court may have had jurisdiction, it was discretionary, and ought not to have been exercised. I cannot agree that, under the circumstances of this case, the Court had such a discretion. When a suit is brought, in foro competente, by a proper plaintiff, against defendants properly amenable to the jurisdiction, praying for relief to which, by the ordinary course of the lex fori, the plaintiff is entitled, it would be error to deny him such relief, unless for some reason sufficient in law. Upon the merits, the present plaintiff's case did not fail, and indeed was not controverted. Being an infant, it was proper for the Court to consider whether the prosecution of the suit was or was not for his benefit. It made that inquiry at the instance of the appellants themselves, with the result that the action was found to be for his benefit; and the order directing its continued prosecution was not appealed from. After this, the decree was, in my opinion, of course. If indeed, there had been any proceedings pending in a Scottish Court equally beneficial to the infant plaintiff and in which his rights and interests could have been adequately protected, it would have been competent and probably right for the High Court in England to stay the further prosecution of this suit, either before or after decree. But no such proceedings were pending in any Scottish Court; whether they could or could not have been taken, it is unnecessary to inquire. If (as was stated at the Bar) they could not, that certainly was no reason why the English Court, proceeding according to its own rules and principles against persons subject to its jurisdiction, should not exercise its jurisdiction in the usual manner.

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(1) 11 Ch. D. 523.
(2) 10 Cl. & F. 42, 84.
(3) 3 Pat. App. Cas. 503, 510.

I therefore move your Lordships to dismiss this appeal, with costs.

LORD BLACKBURN :—

My Lords, at the conclusion of the argument for the appellants I did not entertain any doubt that the order appealed against was right and should be affirmed. But, inasmuch as much depended on the law and practice of the Court of Chancery, with which I, neither as counsel nor as a judge of the Court of Queen's Bench, was familiar, I wished to look at the authorities before delivering my judgment.

When the nature of the case is apprehended, I think it will appear that much of what was said in argument was irrelevant. The testator, John Orr Ewing, was unquestionably a domiciled

Scotchman. He left at his death a testamentary instrument. If any question arose as to the construction of that instrument I think there can be no doubt that every Court which had to construe the will ought to construe it in the same way, and ought in so doing to have regard to the law of the testator's domicil, in this case the Scotch law. But no question arises in this case as to the construction of that will, nor, as far as I can perceive, is it at all likely that any will arise. The six trustees whom the testator appoints, have, by means of a Scotch confirmation, obtained possession of all the Scotch personal estate, and the seal of the Principal Registry of the Probate Division in England having been affixed to that confirmation, they under that obtained possession of all the English personal estate. I think that the fact that the same six trustees got possession of all the property is important as distinguishing this case from *Preston* v. *Melville* (1). Those six gentlemen ought to perform and carry into execution the trusts of that will. They proceeded to do so, acting on their own responsibility, and I see no reason to doubt that all they had done before the institution of this suit was perfectly right.

The suit was instituted on the 25th of February 1880 in the name of Malcolm Hart Orr Ewing, then and still an infant, by his next friend, for the purpose of doing what in popular language is called "throwing the administration of the trust into Chancery." I do not think I can state the object of the suit better than by reading the conclusion of the statement of claim. "It is to the interest of the infant plaintiff that he should be made a ward of this Honourable Court, and it is expedient that the personal estate of the said testator John Orr Ewing should be administered, and that the trust of his said will should be carried into execution by and under the direction of the Court." The plaintiff then claimed that orders should be made to carry this out. Nor do I think I can better state the contentions of the defendants than by reading the concluding paragraphs of the statement of defence:

"17. There is no pretence whatever for saying that the interests of the plaintiff will not be duly protected in this and every other respect by the said Scotch Court. His rights and interests will, in fact, be provided for and protected by the said Scotch Court as effectually as they would be by this Honourable Court if the said testator's estate were an English estate and proceedings had been instituted for the administration thereof by this Court.

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(1) 8 Cl. & F. 1.

"18. Under the circumstances aforesaid the defendants do not admit that it is to the interest of the infant plaintiff that he should be made a ward of this Honourable Court, and they wholly deny that it is expedient that the personal estate of the said testator should be administered, or that the trusts of his said will should be carried into execution by and under the direction of the Court. Any such administration is, for the reasons hereinbefore stated, wholly unnecessary, and would be a needless expense. This action has moreover been instituted and is now being continued against the express wishes of all persons interested in the said testator's personal estate other than the next friend and the mother of the plaintiff, who are, however, not directly interested therein, but are only interested under the will of the said William Ewing, which has not been proved in England.

"19. The defendants submit that, under the circumstances aforesaid, this Honourable Court has no jurisdiction to make any such order as is claimed in this action, and that, in any event, this Honourable Court has only jurisdiction to make an order for the administration of the English personal estate of the said testator.

"20. The defendants further submit that if this Honourable Court shall be of opinion that it has such jurisdiction as aforesaid the exercise of such jurisdiction is a matter of discretion, and that under the circumstances aforesaid it is expedient that this Honourable Court should, in the exercise of its discretion, refuse to make any such order as is claimed in this action, or that, in any event, such order should be limited to the English personal estate of the said testator."

This is not a suit by a creditor suing on behalf of himself and the other creditors to administer an insolvent estate. It is not even suggested that there is any creditor who has not been paid in full, and certainly there is no suggestion that the estate is insolvent. Different considerations might have arisen if it had been such a suit. But it is a suit on behalf of the infant, who at the time of the institution of the suit was of the age of fourteen, and who is now, therefore, still an infant.

Such a suit has incidentally the effect of making the infant a ward of Court, and it often is instituted chiefly with the object of making the infant a ward in Chancery. That certainly was the object in *Johnstone* v. *Beattie* (1), and I should guess, though I do not know, in *Stirling-Maxwell* v. *Cartwright* (2). The writ in the present case had been originally issued on behalf of three infants, and also of the next friend himself. The Court ordered an inquiry whether the action had been properly instituted, and whether it would be fit and proper and for the benefit of the infant plaintiffs that this action should be further prosecuted. The Chief Clerk certified that it was not; but on appeal the late Master of the Rolls reversed this finding as far as regards the now plaintiff and ordered the writ to be amended by striking out the other names. This order of the late Master of the Rolls has not been appealed against, and, whilst it stands unreversed, it disposes of most of the grounds set up in the 18th paragraph of the statement of defence. I do not, however, suppose that on that inquiry any interests but those of the infant plaintiff were considered.

The writ was served on three of the six defendants in England. On the other three, who were not in England, it was, by the leave of the Court, served in Scotland. An application might have been made (as the late Master of the Rolls says, we need not now inquire with what prospect of success) to set aside that service, and then the Court would have had to exercise a discretion as to whether that service should be set aside. But no such application was made, and I think now the case must be treated just as if all six trustees had been, as three of them were, in England, and served with the writ in England.

It was argued that the domicil of the testator being Scotch, the Court of Chancery had no jurisdiction at all; that the jurisdiction depended on the domicil of the testator, or at least on

(1) 10 Cl. & F. 42.

(2) 11 Ch. D. 523.

the probate in England, and was therefore confined to the comparatively small part of the property that was obtained by means of the English probate.

I do not think that there is either principle or authority for this contention. The jurisdiction of the Court of Chancery is in personam. It acts upon the person whom it finds within its jurisdiction and compels him to perform the duty which he owes to the plaintiff.

Suppose a possible, though not a very probable case. Suppose that after making this will, John Orr Ewing had for any reason changed his domicil and become, let us suppose, domiciled in the United States, and there had made a short will to the effect that being now a domiciled American, and wishing to avoid possible disputes as to the validity of the testamentary disposition made by him in the Scotch form whilst a Scotchman, he left everything to the six trustees named in it upon trust to carry out what they would have had to do under that will if he had still remained a Scotchman. It would have been necessary to have obtained probate in England in order to obtain the English assets as it would no longer be sufficient to affix the seal of the Probate Division to the Scotch confirmation. I think the supposed change of domicil would have made no other difference. When the property was in the hands of the six gentlemen in England, and the Court of Chancery, at the instance of a plaintiff who had an interest in the fulfilment of the trust, ordered them to fulfil it, could it have been said that the Court had no jurisdiction and must send the plaintiff to the American Court? I think it would require very strong authority to lead one to that conclusion, and no authority has been cited, and I know of none.

I think, therefore, it is plain that the Court had jurisdiction; and that was the opinion of Manisty J., as well as of the Court of Appeal. But Manisty J. thought that the Court had a discretion either to exercise this jurisdiction or not, and that under the circumstances it should not exercise it. I do not agree in thinking that the order should, or indeed could, if made, be confined to that part of the property which is in England, or which was obtained by virtue of an English probate; as was pointed out by

Vice-Chancellor Kindersley in *Innes* v. *Mitchell* (1), the trust is an entire trust as to all the property. But it is said that there is a discretion as to making an order to carry out the trusts under the direction of the Court. If this were a new question I should think there was much to be said in favour of this view. For the order made here that the trusts should be carried out under the direction of the Court is one which I do think is not always for the advantage of all concerned. There are great advantages no doubt to the trustees, who, whenever they have a doubt as to what is to be done, can avoid responsibility by asking for the direction of the Court. And there are advantages to those beneficially interested, as the trustees are under the control of the Court, and are not able to do what they may consider proper acts, if the Court thinks those acts of such a nature as ought not to be done. But on the other hand, such an order does and must hamper the trustees, cause delay and expense, not necessarily great delay and expense, but always some; and where the trustees have not done, and it is not suggested that they are going to do, anything wrong, I doubt whether it is always for the benefit of all concerned to make such an order. And I am confirmed in this doubt, because, as far as I can learn, you cannot, in Scotland, throw a trust into the Court of Session in the same way as you can throw it into Chancery in England. At least if it can be done it is not done. But though I should have had this doubt if it were new, I think it has been too long the course of Chancery to treat this as a right which the plaintiff has ex debito justitiæ. I find no case in which it has been said that he must satisfy the Court that it is discreet to make the order.

I think, if it lay on the plaintiff to satisfy the Court in its discretion that it was better for all concerned that the trust should be administered under the control of the Court of Chancery, the fact that the whole matter is substantially Scotch would throw upon the plaintiff an additional burthen of proof. But I find, as I said, no case in which this has been laid down. And in *Stirling-Maxwell* v. *Cartwright* (2), and in the present case, a great many judges of great experience in equity have evidently thought that

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(1) 4 Drew. 98.

(2) 11 Ch. D. 523.

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it was to be done ex debito justitiæ unless there was some sufficient ground shewn for saying that it would be an abuse of the process to make such an order, as for instance, where the trust was already being administered in Chancery in Ireland, where there is such a mode of proceeding, or I suppose anything else satisfying the Court that their process is abused. Quite consistently with this it may be that the Court of Chancery may think it a fit direction to the trustees to obey and follow a judgment given in a Scotch Court on some particular question, as for instance here to act on the decision of the Scotch Court affirmed in this House last session, on the construction of the co-partnery agreement (1).

If, practically, such suits as this do cast great additional cost on those administering trusts substantially Scotch, or if such suits are used for the purpose of removing profitable business from Scotch practitioners to English ones, the remedy would seem either to be sought in altering the rules under which the Chancery Division acts, or by an application to the legislature.

LORD WATSON:—

My Lords, I shall content myself with stating that I do not, after hearing the argument for the appellants, entertain any doubt that the judgment of the Court of Appeal must be affirmed.

This is an English case, which it is my duty to decide according to the principles of English law, and its circumstances are such that the Court of Chancery could not, in my opinion, have declined jurisdiction without disregarding a long and consistent series of precedents, which must now be held to be binding on all who administer justice in that Court.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 30th Nov. 1883.

Solicitors for appellants: *Johnsons Upton Budd & Attkey.*
Solicitors for respondent: *Lattey & Hart.*

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(1) *Ewing* v. *Ewing*, 8 App. Cas. 822.

[HOUSE OF LORDS.]

H. L. (E.)
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Nov. 30.

ARCHIBALD EDWARD DOBBS . . . APPELLANT;

AND

THE GRAND JUNCTION WATERWORKS COMPANY . . . . RESPONDENTS.

Waterworks Company—Water-rate to be calculated on "annual value"—"Annual value" meaning net annual or rateable Value.

A water company by a special Act of 1826 were compellable to supply water to certain dwelling-houses in the metropolis for domestic purposes at certain rates per cent. per annum payable "according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor's-rate is computed in the parish or district where the house is situated."

By a special Act of 1852 the company were compellable to furnish the water "where the annual value of the dwelling-house or other place supplied shall not exceed £200 at a rate per cent. per annum on such value not exceeding £4; and where such annual value shall exceed £200, at a rate per cent. per annum on such value not exceeding £3."

The occupier of one of the houses was lessee for a long term at a ground rent, and paid no rent except the ground rent:—

Held, reversing the decision of the Court of Appeal, that whether the later Act repealed the provisions of the former or not the case must be dealt with under the later Act; and that the words "annual value" in the later Act meant "net annual value" as defined in the Parochial Assessments Act 1836 (6 & 7 Will. 4 c. 96) s. 1.

Held also that "annual value" had the same meaning in the earlier as in the later Act.

Colvill v. *Wood* (2 C. B. 210) commented on.

APPEAL from an order of the Court of Appeal (1) reversing an order of the Queen's Bench Division (2).

The facts, which are fully set out in the reports of the decisions below (1) and (2), were briefly as follows:—

The appellant was the lessee for a term (of which about 70 years were unexpired) at a ground rent of £15 a year of a house, No. 34 Westbourne Park, Paddington, which he occupied

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(1) 10 Q. B. D. 337.

(2) 9 Q. B. D. 151.

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as his residence. His lease contained covenants by the lessee to repair and insure, as well as the usual covenants by a tenant.

The Grand Junction Waterworks Act 1826 (7 Geo. 4 c. cxl.) s. 27 enacted that the respondents should be obliged to furnish water to certain private dwelling-houses (including the appellant's) at certain rates per cent. per annum, viz.: where the rent should not exceed £20, at a rate per cent. per annum not exceeding £7 10*s.*; and where the rent should be above £20 and not exceeding £40, at a rate per cent. per annum not exceeding £7; and so on, the rate diminishing as the rent increased up to £100; and that "where such rent shall be above £100 per annum at a rate per cent. per annum not exceeding £5; and every such rate shall be payable according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained, according to the actual amount or annual value upon which the assessment to the poor's rate is computed in the parish or district where the house is situated;" subject to a maximum limit of £20, and a minimum limit of 12*s.* in any one year for such supply.

The Grand Junction Waterworks Act 1852 (15 & 16 Vict. c. clvii.) s. 46 enacted that the respondents should at the request of the owner or occupier of certain houses (including the appellant's) furnish a sufficient supply of water for their domestic purposes at the rates thereinafter specified; (that is to say)

"Where the annual value of the dwelling-house or other place supplied shall not exceed £200, at a rate per cent. per annum on such value not exceeding £4; and where such annual value shall exceed £200, at a rate per cent. per annum on such value not exceeding £3;" with additional rates for water-closets and baths.

S. 57 enacted that "except as by this Act expressly provided, this Act or anything therein contained shall not repeal, alter, interpret, or in any manner affect any of the provisions of the recited Acts, or any of them in force at the commencement of this Act." One of the recited Acts was the 7 Geo. 4 c. cxl.

The respondents contended that the appellant was liable to pay for water supplied by them to his house for domestic purposes at the rate of £4 per cent. upon £140; and the appellant

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contended that he was liable at the rate of £4 per cent. upon £118; the sums of £140 and £118 being the "gross value" and the "rateable value" respectively of the premises, appearing in the valuation list for the time being in force under the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67).

The metropolitan police magistrate, to whom the question was referred under the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17) s. 68, decided in favour of the respondents, and at the appellant's request stated the above facts in a case, in which the question for the Court was whether the "gross value," as interpreted by the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), or the "rateable value" was the proper basis of assessment for the water-rate (1). The Queen's Bench Division (Field and Bowen JJ.) reversed the magistrate's decision and decided in favour of the appellant (2).

The Court of Appeal (Lord Coleridge C.J. Baggallay and Lindley L.JJ.) reversed that decision and decided in favour of the respondents (3).

Aug. 2, 3. *Davey* Q.C. and *Webster* Q.C. (*Sutton* and *Poley* with them) for the appellant:—

Whether the earlier of the respondents' Acts is repealed by the later or not the appellant is liable to pay on the rateable and not on the gross value. In both Acts "annual value" means rateable not gross value. When the Act of 1826 was passed the only Act in force as to poor's-rate was the 43 Eliz. c. 2, under which the overseers were bound "to deduct from the annual rent a portion for repairs, reproduction &c., in order to arrive at the annual value:" *R.* v. *Tomlinson* (1); *R.* v. *Mitton* (2); *R.* v. *Lord Granville* (3); *R.* v. *Adames* (4). The Parochial Assessments Act 1836 (6 & 7 Wm. 4 c. 96, s. 1, and Sched.) declared the law to be as laid down in the above decisions; see Parliamentary Papers 1843 vol. 20, Reports of Poor Law Commissioners on Local Taxation No. 9 pp. 26–34, where the whole subject is elaborately discussed. Then came the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103), ss. 14, 15, defining "gross estimated rental." The Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), ss. 161, 170, enacted that for certain purposes "annual value" should be estimated according to the estimate or basis on which the county rate was assessed. The county rate was assessed under 55 Geo. 3 c. 51, altered by 8 & 9 Vict. c. 111 s. 6 and 15 & 16 Vict. c. 81 s. 6, by which "full and fair annual value" was to mean "net annual value." Down to 1869 "annual value" always meant rateable value, and still does unless otherwise expressly provided, as in 32 & 33 Vict. c. 67 (the Valuation Metropolis Act 1869) where "gross value" is mentioned for the first time. Sect. 4 defines "gross value" and "rateable value." Sect. 45 enacts that in construing the House Tax Acts (48 Geo. 3 c. 55 Sch. B. rr. 7–11, and 14 & 15 Vict. c. 36 ss. 1, 2), the full and just yearly rent should be deemed to be the gross value stated in the valuation list. In both the respondents' Acts annual value must mean net profit, the rent less deductions; the words must be read subjectively to a particular individual; not objectively nor in the abstract. As Bayley J. said in *R.* v. *Tomlinson* (5) "annual value" is part of the rent, but is not the same thing as the rent. The annual value of a horse let out to hire is the amount of hire less expenses of food, blacksmith, &c. The value to the tenant where there is a rack-rent is nil: the rent is a liability not a subject-matter of value. Therefore "annual value" must mean value to the owner, not to the tenant. [They also referred to the Public Health Act 1875 (38 & 39 Vict. c. 55) s. 4 for the definition of rack-rent and "full net annual value," and to sect. 211, as shewing that the Legislature imposes rates on net not gross values.]

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(1) By sect. 4 of the Valuation (Metropolis) Act 1869 "The term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rent-charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent. The term 'rateable value' means the gross value after deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses as aforesaid."

(2) 9 Q. B. D. 151.

(3) 10 Q. B. D. 337.

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(1) 9 B. & C. 163, 166.

(2) 9 B. & C. 810, 819.

(3) 9 B. & C. 188.

(4) 4 B. & Ad. 61, 66.

(5) 9 B. & C. 166.

Sir *F. Herschell* S.G. and *Finlay* Q.C. (*J. F. Clerk* with them) for the respondents:—

The respondents' Act of 1826 is repealed by the Act of 1852 both as to the scale, and the subject-matter of the scale; but if not repealed, the Court of Appeal put the true construction on the Act of 1826. "Annual value" means the value not to the landlord, but to the tenant who has to pay the water-rate. The expense of repairs or insurance ought not to be deducted: *Colvill* v. *Wood* (1). In the respondents' Act of 1826 "assessment" means "valuation:" see Webster's Dictionary. In that Act annual value clearly meant gross value because it is to be an equivalent for the actual rent where rent is paid. At that time what is called the proportionate system of rating was in force, see 37 Geo. 3 c. 65 as to county rates, and *R.* v. *Brograve* (2). The distinction between poor's-rate and water-rate is that poor's-rate though at first paid by the occupier ultimately falls upon the landlord; but the water rate is altogether an occupier's rate (except in the case of dwelling-houses of which the annual value does not exceed £10 under s. 72 of the Waterworks Clauses Act 1847, which is incorporated in the respondents' special Acts, or £20 under the respondents' Act of 1852 s. 51) and therefore "annual value" must mean (as to houses above £20) value to the occupier. The rent was held to be the yearly worth or annual value in *Sheffield Waterworks Company* v. *Bennett* (3) per Bramwell and Cleasby BB. [They also referred to 43 Geo. 3 c. 161 Sch. B. s. 7.]

Davey Q.C. in reply.

The respondents have not produced any authority for holding "annual value" to mean gross estimated rental, except *Colvill* v. *Wood* (1) under the Reform Act of 1832, where the inclination was (as it always is) not to disenfranchise a voter, and where the Court held that the Rating Acts did not apply. In 48 Geo. 3

(1) 2 C. B. 210.
(2) 4 Burr. 2491.
(3) Law Rep. 7 Ex. 409, 420, 421.

c. 55 Sch. B. "full annual value" is used as a synonym for rateable value; at which time "gross estimated rental" had not been heard of. *Hamilton* v. *Bass* (1) decides the principle in favour of the appellant.

[For the remainder of the arguments on both sides the reader is referred to the report of the case in the Court of Appeal (2), where the arguments were substantially the same as in this House.]

The House took time for consideration.

Nov. 30. LORD BRAMWELL:—

My Lords, in this case your Lordships intimated at the last sittings that you would give judgment in favour of the appellant, saying that you would state your reasons at a subsequent time. I have prepared some reasons which I propose now to submit to your Lordships.

I think this case may be dealt with as governed by 15 & 16 Vict. c. clvii. s. 46. For either that is the same in effect as the 7 Geo. 4 c. cxl. s. 27 (which I do not think), or it is different. If the former, the meaning of the two being the same, either may be considered; if the latter, then the provisions of the later Act put an end to the operation of those of the former. In either case it may be disregarded. An Act which says the law in future shall be different from what it was, may not, strictly speaking, be said to repeal it, but it abrogates it for the future. The question then is, what is the meaning of "annual value" in sect. 46 of 15 & 16 Vict. c. clvii? Now, without undertaking an all-sufficient definition, it seems to me that we may safely adopt that in 6 & 7 Wm. 4 c. 96 viz., "the rent at which they might reasonably be expected to let from year to year free of all usual tenant's rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." This is their value. If a rent exceeding this cost could not be got, they would be valueless. It is as impossible to say that the annual rent without such deduction is the annual value as it is to say that the daily hire of a horse is its daily value without deduction for its keep, &c. This is the value, the net, the only value. The Solicitor-General said that this was to interpolate the word "net." That is not so. Value means net value; net value means value. *He* did propose to interpolate a word, "gross." Now gross value is different from value. It is, though a convenient, an inaccurate expression, like "gross profits." The difference between what a thing costs and the larger sum it sells for is not profit if the buying and selling are attended with expense to the trader. Value is net value, and involves those deductions from rent which the appellant claims. I am confirmed in this by the provision in 15 & 16 Vict. c. clvii., which makes the owner liable for the water-rate of small tenements (1). What is the value of them to him? What he gets, minus what it costs him to get it. But the value cannot be greater in the hands of the tenant.

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(1) 12 C. B. 631.

(2) 10 Q. B. D. 338–345.

Hamilton v. *Bass* (2) is really in point. Property was let at a gross yearly rent of £75 15*s.*, with an agreement that the landlord should pay all rates and taxes. Deducting them, and £1 6*s.* for expenses of collection, and £4 for repairs, the net rent was reduced below £60, and it was held that this did not qualify thirty forty-shilling freeholders. The statute of 8 Henry 6, c. 7, giving the right of voting to those "who have free land or tenement of the value of 40*s.* by the year at the least above all charges," Maule J. said, "If a man has a piece of land by means of which he can enable himself to expend 40*s.* a year by laying out 5*s.* upon it, can that be said to be of the value of 40*s.* a year?" (3) Judgment was given against the vote on this reasoning.

In *Colvill* v. *Wood* (4) it was, indeed, held that the fair annual rent of premises is the proper criterion of their clear yearly value within the statute 2 & 3 Will. 4 c. 45 s. 27, without making any deduction for landlord's repairs. But that case was expressly decided on the ground that the vote was given to the occupier, and that it was "obvious the Legislature could never have intended that the right of a tenant to vote should depend on calculations so nice, artificial, and difficult of application as what the *value* was to the tenant," that depending "on the use to which he puts it," and other matters.

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(1) Sect. 51 of the respondents' Act of 1852 made the owners of houses or parts of houses, occupied as separate tenements not respectively exceeding the annual value of £20, liable to the payment of the water-rates instead of the occupiers.

(2) 12 C. B. 631.

(3) 12 C. B. at p. 634.

(4) 2 C. B. 210.

Earl of Selborne L.C.:—

My Lords, I agree, as I believe all your Lordships agree, in the result and generally in the reasoning of the opinion which has just been delivered. I should like to add a few words, because I confess that there is a single point, which is not material to the result, upon which I am not sure that my opinion is quite the same as that of my noble and learned friend who has just addressed your Lordships. My noble and learned friend, as I understood, expressed an opinion that the meaning of the words "annual value" may be, if it is not, different in the two Acts, namely, 7 Geo. 4 c. cxl. and 15 & 16 Vict. c. clvii. He gives reasons, in which I concur, for thinking that if that be so, or whether it be so or not, it makes no difference in the result. I confess that I am not inclined myself to differ from the two Courts below upon that particular point. They thought that nothing was really altered in this respect by the later Act except the steps of the scale, if I may so call them, but that the words "annual value" in the later Act had the same meaning with those in the earlier Act, and made it competent, if it were necessary or useful, to refer to the earlier Act for the elucidation of that meaning. I confess that, this having been the opinion, as I read it, of all the judges in both Courts below, I am so far not prepared to dissent from them. The words in the original Act are "the actual amount or annual value," and then as to the "annual value" it refers to the computation of the assessment to the poor-rate. The words in the later Act are "the annual value" throughout, it being expressly declared that the earlier Act is not to be repealed, altered, interpreted, or in any manner affected by the later Act except as expressly follows from it. Well, I cannot but think that reading the earlier Act with the later, the words "the annual value," upon those Acts alone, ought to be taken to mean the same thing in the second Act as they mean in the first. That might be very important if I agreed (as I do not agree) with the interpretation placed upon the words of the first Act by the Court of Appeal; but I confess that the words of the first Act only appear to me to make that which I should have thought reasonably clear without them still clearer; I mean the words "the actual amount or annual value upon which the assessment to the poor's-rate is computed in the parish or district where the house is situated." That does not appear to me to relate to the computation in any particular year, but as it is from time to time computed; and whether you look to the principle of valuation upon which the computation of the assessment to the poor-rate proceeded in the seventh year of King George IV., or to that which, in order to cut off all opportunity for abuse, was expressly declared by the Parochial Assessments Act, 6 & 7 Will. 4 c. 96, some years afterwards, it appears to be plain that the mode of valuing for the purpose of computing the assessment to the poor-rate was first to ascertain what is called the gross value, then to make the deductions necessary in order to arrive at the real value, and, the real value having been so ascertained, the computation of the assessment to the poor-rate was practically the same whether it did or did not proceed to strike off equally all round a certain proportion of the value ascertained with reference to the true facts of the case. That appears to me to affect the assessment merely, but not the principle of valuation or the principle of computation. I agree with Lord Coleridge that the Act did not refer to the assessment itself, it referred to the value upon which the assessment was computed. But the value upon which the assessment was computed was in principle and properly the net value and not the gross value; and it is expressly so declared to be, for the purposes of the poor-rate, by the later Act 6 & 7 Will. 4 c. 96.

I thought it desirable to say as much as I have now said, because assuming the second Act, as far as the meaning of the words "annual value" is concerned, not to use them in a different sense from the first, I think that the light which the former Act throws upon the latter is not against but is favourable to the

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conclusion at which your Lordships have arrived. I entirely agree with my noble and learned friend who has just addressed your Lordships that as we have to deal with the word "value," we must take that word in its natural sense, unless there is something in the Act that points to an artificial or arbitrary sense, which I do not discover. Therefore, I understand my noble and learned friend to move that the judgment under appeal be reversed and that the order of the Queen's Bench Division be affirmed; and in that motion I agree.

Lord Blackburn:—

My Lords, I entirely agree with the result which has been arrived at by your Lordships, namely, that the order of the Court of Appeal should be reversed and the Order of the Queen's Bench Division affirmed; and I rather think that in substance there is no great difference in the way in which one comes to that result. I quite agree with the noble and learned Lord opposite (Lord Bramwell) in what he says, that when the second Act was passed reciting the first and saying that it was not repealing it, if it enacted a rule that was contrary to it it had really the effect of repealing it and it was the same thing as if it had been repealed. I quite agree also with what the noble and learned Lord on the Woolsack has said, namely, that if the former Act had the same meaning as the second one has, which of course involves the question whether the Court of Appeal are right in the construction which they put upon it, it would be a great additional reason for saying, "We hold this construction of the Act."

But the real point upon which it seems to me that the whole thing ultimately turns is this, Are the words "annual value" as used in this Act, primâ facie to mean the real annual value expressed and explained in the Parochial Assessment Act, that is to say the value after deducting the necessary burdens upon it, or not? After considering the case, and considering what has been said and the cases which have been cited, I cannot bring myself to doubt that that is the ordinary and proper meaning of the word "value" when it is used, unless there be something to shew that the Legislature intended it in a different sense, which of course there might be. And the one point upon which I was rather desirous of saying a word is this, that I do not think it is to be understood (and certainly I myself do not so understand), that the case of *Colvill* v. *Wood* (1), which has been referred to, in which it was decided that in the Reform Act the words "clear yearly value" were to be understood not in this way but as meaning the rent, is in fact overruled. I do not think that it is. I do not inquire at present whether the reasoning there is to my mind quite satisfactory or is not. I do not care how that is—but as regards the Reform Act, after the thirty years that it has been acted upon, I should not hesitate in saying that it is too late to cast any doubt upon it. But the question is whether or not that is the meaning. Now I quite agree with what has been said by the noble and learned Lord opposite (Lord Bramwell) as to the circumstances of that Act and as to giving the franchise to a person, that that might apply to cut down or alter the words used there as meaning something different and something less than they would have meant generally if they had been used in another way. But if that case is to be considered as saying that in all cases the value is to mean what was contended for by the waterworks company here, namely, the rental without regard to the deductions from it in order to make it the real value, I cannot agree with it. I think that the general meaning of these words, unless there be something to alter it, is that which is put upon them by your Lordships; and consequently that the decision of the Queen's Bench Division was the right one, and that the decision of the Court of Appeal was founded upon a mistake and ought to be reversed.

LORD WATSON:—

My Lords, I concur. I agree with the process of reasoning by which my noble and learned friend on my right (Lord Bramwell) has shewn that the words "annual value," as they occur in the statutes which we have to construe, signify annual net value, which I take to be the primary meaning of the words. I do not understand that the judgment of this House, or the opinion of my noble and learned friend, goes beyond that, or decides that in every statute, no matter what is the context, these words must be read as meaning net value.

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(1) 2 C. B. 210.

LORD BRAMWELL:—

My Lords, my noble and learned friend Lord FitzGerald, who is unable to attend to-day, wishes me to say that he concurs in the reasons which I have suggested to your Lordships for this judgment.

I wish to add, for myself, that I should have come to the same result on the 7 Geo. 4 c. cxl, although the effect of the two Acts is not, in my opinion, precisely the same.

Order of the Court of Appeal reversed; Order of the Queen's Bench Division restored. The respondents to pay the costs in the Court of Appeal and of the appeal to this House; cause remitted to the Queen's Bench Division.

Lords' Journals 30th Nov. 1883.

Solicitors for appellant: *Hollingsworth, Tyerman, & Andrewes.*
Solicitors for respondents: *Bircham & Co.*

[HOUSE OF LORDS.]

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1883
Dec. 3.

RICHARD COOMBER (SURVEYOR OF TAXES) . APPELLANT;

AND

THE JUSTICES OF THE COUNTY OF BERKS . . . . RESPONDENTS.

Revenue—Income Tax—Assize Courts—Police Stations—5 & 6 *Vict. c.* 35—16 & 17 *Vict. c.* 34, *Schedules A. and B.*

The justices of a county in the due exercise of statutory powers erected assize courts with the usual rooms and offices, and a county police station with the usual offices and accommodation for constables living there and for prisoners. The land on which they were built was conveyed under 21 & 22 Vict. c. 92, to the clerk of the peace to hold to him and his successors for ever upon trust for the construction of a police station and otherwise for such uses as the county justices should from time to time order. The buildings formed one block and were used for the administration of justice and for police purposes. Parts of the buildings were also used for holding county and committee meetings and various other occasional purposes, but no rent or profit was received or made in respect of the buildings or any part of them:—

Held, affirming the judgment of the Court of Appeal, that income tax was not payable in respect of the buildings under Scheds. A. or B. of 5 & 6 Vict. c. 35, and 16 & 17 Vict. c. 34.

Clerk v. *Dumfries Commissioners of Supply* (7 Court Sess. Cas. 4th Ser. 1157) disapproved.

APPEAL from an order of the Court of Appeal (Baggallay, Brett and Lindley L.JJ.) (1), affirming an order of the Queen's Bench Division (Grove J. and Huddleston B.).

The question was whether a block of buildings comprising county assize courts, police station, and the usual rooms and offices incidental thereto, were liable to income tax. The material facts are fully set out in the report of the case in the Queen's Bench Division (2).

Nov. 13, 14, 15. Sir *H. James* A.G. and the *Lord Advocate* (*Balfour* Q.C.) (Sir *F. Herschell* S.G. and *A. V. Dicey* with them) for the appellant:—

The question is whether the principle of assessment adopted

(1) 10 Q. B. D. 267.

(2) 9 Q. B. D. 17.

by the Courts below, or that laid down in *Clerk* v. *Dumfries Commissioners of Supply* (1) is the right one. The assessment was made under the Income Tax Act, 1879 (42 & 43 Vict. c. 21) s. 15, the words of which are not the same as those in the Act relied upon in the judgment of the Queen's Bench Division, 16 & 17 Vict. c. 34, "duties on profits." The 16 & 17 Vict. c. 34 shews the subject, viz. under Sched. A. "the property in all lands, tenements, hereditaments and heritages," and under Sched. B. "the occupation of all such lands," &c.; and 5 & 6 Vict. c. 35 s. 60, Sched. A. No. 1 shews the mode of assessment. That the premises produce no profit is nothing provided they are "capable of actual occupation;" all such lands, &c., are assessable, "of whatever nature and for whatever purpose occupied or enjoyed:" 5 & 6 Vict. c. 35, s. 60, Sched. A. No. 1, subject to the allowances under sect. 61. These Acts go beyond Mr. Pitt's original Act of 1803 (43 Geo. 3 c. 122, s. 31, Sched. A. No. 1, general rule), in which there is nothing about capability. And sect. 70 of 5 & 6 Vict. c. 35 makes all lands, tenements, and hereditaments assessable, "whether occupied at the time of assessment or not." These buildings are capable of actual occupation and of being let for a profit. Under sect. 63 Sched. B. No. 9 rule 2, every person having the use of lands or tenements is to be considered for the purposes of the Act as the occupier, and this answers the objection that there is no occupier here. The respondents have the use and are therefore for this purpose the occupier; but if not then the legal owner, the clerk of the peace is. The *Mersey Docks Cases* (2) relied on by the respondents have no application, for the Crown (even if it were the occupier) is not the owner: see 7 Geo. 4 c. 63 s. 1 repealing 9 Geo. 3 c. 20. The principle of Crown exemption may apply to local rates levied by a local body, but cannot apply to a tax expressly granted to the Crown. Poor-rate considerations may apply to Sched. B. but cannot to Sched. A. To claim the Crown exemption property must be used "exclusively in and for the service of the Crown": *Greig* v. *University of Edinburgh* (3). Even if the assize court portion be exempt, the police station part is not, being used for local not imperial purposes. If the buildings are provided out of funds other than Crown funds and are capable of being let they are taxable: *Clerk* v. *Dumfries Commissioners of Supply* (1), which decision must be wrong if the respondents are right. The justices here are owners as well as occupiers; and they are also liable as a "body" or "society of persons" under 5 & 6 Vict. c. 35, s. 40. [They referred to *Bent* v. *Roberts* (2); *Justices of Lancashire* v. *Cheetham* (3); *Attorney-General* v. *Earl of Sefton* (4).]

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(1) 7 Court Sess. Cas. 4th Ser. 1157.

(2) 11 H. L. C. 443.

(3) Law Rep. 1 H. L., Sc. 348.

H. Mathews Q.C. and *Gorst* Q.C. (*H. D. Greene* with them) for the respondents:—

Income tax under Sched. A. is payable by the occupier; there is no provision in the Acts making the owner liable: 5 & 6 Vict. c. 35, s. 63, No. IX. rule 1, and s. 73. Even where there is no occupier the only remedy is by distress "at any time after" the duties are payable (s. 70); there is no direct right against the owner. The question then is who is the occupier. Either there is no occupier at all or else the Crown is occupier. The courts and police station are used for Crown purposes and are therefore exempt: *Justices of Lancashire* v. *Stretford* (5). The administration of law and the preservation of the peace have always been considered especially the duty of Government. The police are under the control of the Secretary of State. In the metropolis they are maintained and managed by the Government. It is immaterial that in other districts the machinery of management is different. The justices are themselves appointed by the Crown and hold office during pleasure. The *Mersey Docks Cases* (6) have been treated as settling that such buildings as these are not liable for rates: *Reg.* v. *St. Martin's, Leicester* (7); *Reg.* v. *McCann* (8). There is no legal power in the justices to let the building for other purposes than those for which it is held: see 7 Geo. 4 c. 63 and 21 & 22 Vict. c. 92 s. 3.

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(1) 7 Court Sess. Cas. 4th Ser. 1157.

(2) 3 Ex. D. 66.

(3) Law Rep. 3 Q. B. 14.

(4) 34 L. J. (Ex.) 98.

(5) E. B. & E. 225.

(6) 11 H. L. C. 443.

(7) Law Rep. 2 Q. B. 493.

(8) Law Rep. 3 Q. B. 677.

The Lord Advocate (*Balfour* Q.C.) in reply:—

Justices of Lancashire v. *Stretford* (1) (relied on by the respondents) was decided before the *Mersey Docks Cases* (2) and at a time when it was considered that mere use for public purposes was a sufficient ground of exemption. *Reg.* v. *St. Martin's, Leicester* (3) is at variance with *Clerk* v. *Dumfries Commissioners* (4).

The House took time for consideration.

Dec. 3. LORD BLACKBURN:—

My Lords, the commissioners for general purposes of the income tax having determined, on appeal by the now respondents, that certain buildings were not properly assessable to income tax, the now appellant required the commissioners to state a case, which was done. On that case the Queen's Bench Division, revenue side, on the 24th of March 1882 made this order: "The Court are of opinion that the buildings described in the assessment of income-tax for the year 1879–80 for the parish of St. Laurence, Reading, as assize courts &c. are not properly assessable to income tax, and affirm the determination of the said commissioners. And do order that the costs of the said respondents of this appeal, including the costs of and occasioned by the amendment of the said case, be paid to them by the said appellant. And it is hereby referred to the Queen's Remembrancer to tax such costs."

The now appellant under the power given by statute 41 Vict. c. 15 s. 15 appealed to the Court of Appeal. And this order was made: "In Her Majesty's Court of Appeal, Thursday the 21st day of December 1882, Richard Coomber (surveyor of taxes), appellant, and the justices of the county of Berks, respondents. On appeal by the appellant from an order of the High Court of Justice, Queen's Bench Division, Revenue Side, dated the 24th day of March 1882. Upon reading, on the 29th and 30th days of November last, the above-mentioned order, and the notice of appeal herein, and on hearing Mr. A. V. Dicey of counsel for the appellant, and Henry Matthews Esquire Q.C. and J. E. Gorst Esquire Q.C. for the respondents, and Sir Farrer Herschell, Knight, Her Majesty's Solicitor-General, in reply, the matter was adjourned for judgment until this day. Now, it is ordered by the Court that the said order of the 24th day of March last be and the same is hereby confirmed. And it is further ordered that the costs of this appeal be paid by the said appellant to the said respondents. And it is hereby referred to the Queen's Remembrancer to tax such costs."

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(1) E. B. & E. 225.
(2) 11 H. L. C. 443.
(3) Law Rep. 2 Q. B. 493.
(4) 7 Court Sess. Cas. 4th Ser. 1157.

From this order there has been an appeal to this House; and the question, therefore, now to be determined is whether the original order of the Queen's Bench Division is right.

The jurisdiction to determine on such a case was originally created by 37 Vict. c. 16 s. 10. The Court were required to determine the "questions of law arising on the case."

The case shews that the buildings in question were built on land purchased under the authority of public Acts by the county, and paid for out of the county rates; that on it the buildings, or rather one building, was erected to answer the double purpose of being an assize court and a police station. The case states various details as to how they are occupied, on which some minor points are raised with which I shall deal hereafter. But the main facts are clear—that the buildings were required bonâ fide for the purpose of fulfilling the duty cast on the county in aid of the general government, of having courts and having a police station, and that no revenue is derived from them. Does this, assuming for the present that the buildings are not more than is required for those purposes, bring them within the implied exemption by virtue of the prerogative?

In *Rex* v. *Cook* (1) the general principle as to the construction of statutes imposing charges as containing an exemption of the Crown was laid down. That was a case raising the question whether the duty on post-horses was exigible in respect of post-horses carrying an express from the Governor of Portsmouth to one of His Majesty's Principal Secretaries of State, which was not on any private business whatever, but wholly related to the public concerns of this kingdom. It was held that it was not exigible. Lord Kenyon, delivering the judgment of the Court, says, "Now, although there is no special exemption of the king in this Act of Parliament (25 Geo. 3 c. 51) yet I am of opinion that he is exempted by virtue of his prerogative in the same manner as he is virtually exempted from the 43 Eliz., and *every other Act imposing a duty or tax on the subjects*." There may well be expressions in an Act imposing a duty or tax on the subject such as to shew that the intention of the legislature was to impose the duty on some property belonging to the Crown. But I do not think it made out that there is any such intention shewn in the Income Tax Act. Reliance was placed in the argument on the general words of the rule, "which rule shall be construed to extend to all lands, tenements, and hereditaments or heritages capable of actual occupation of whatever nature and for whatever purpose occupied or enjoyed (1)." But I do not think this can be construed as taking away the exemption, by virtue of the prerogative, of property actually occupied or enjoyed by the Crown.

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(1) 3 T. R. 519.

Lord Mure, in the Scotch case of *Clerk* v. *Dumfries Commissioners of Supply* (2), seems to have been struck by the 8th rule under No. IV.: "The duty to be charged in respect of any house, tenement, or apartment belonging to Her Majesty, in the occupation of any officer of Her Majesty in right of his office or otherwise (except apartments in Her Majesty's royal palaces) shall be charged on and paid by the occupier of such house, tenement, or apartment upon the annual value thereof." As the tax is imposed on the salary of such officers it was most reasonable to provide that, where the salary was partly paid by a rent-free house, the officer should pay the tax on that house, but I cannot think that affords any ground for saying that the legislature intended to impose the tax on Crown property generally so as to take away the exemption that would otherwise be implied. I should rather infer that those who framed the Act thought that, unless expressly named, such an occupation would have been exempted.

It is on the application of this general principle to the facts stated in the case that in my opinion the whole difficulty of the case arises.

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(1) 5 & 6 Vict. c. 35 s. 60 Sch. A. No. 1.

(2) 7 Court Sess. Cas. 4th Ser. 1157.

I do not think it can be disputed that the administration of justice, both criminal and civil, and the preservation of order and prevention of crime by means of what is now called police, are among the most important functions of Government, nor that by the constitution of this country these functions do, of common right, belong to the Crown.

In England a subject may have a franchise, giving him the right to administer justice in a particular locality in Courts held by him; and he may also have a right to name the constables. In early times, such local franchises were of value for the revenue derived from the fees, and, no doubt, as increasing the local influence of the grantee. But it was always held that on a proceeding in quo warranto the Crown could call on the person in possession of such a franchise to shew his title, on the ground that they were among the matters quæ mere spectant ad regem, and that unless he shewed a title by grant from the Crown, or by prescription, the franchises were seized and he was ousted. (See Comyns' Digest, Quo Warranto A, and the authorities there collected). In the present case there is no question raised as to any franchise in the hands of a subject.

From very early times, judges acting under the King's commission went down to administer justice in counties. The sheriff, the head officer of the county, but appointed by the Crown, was always called upon to attend them, and to provide lodging and accommodation for them. He did this at the cost of the county. I do not stop to inquire by what machinery the cost was in early times defrayed. It is now provided for by the statutes referred to, and comes out of the county rate.

The sheriff also was bound to raise the hue and cry, and call out the posse comitatus of the county whenever it was necessary for any police purposes; in so doing he was acting for the Crown, but the burthen fell on the inhabitants of the county. By modern legislation, the county police are arrayed at the expense of the county, defrayed by a police rate on the county, supplemented, in some cases, by grants from the imperial revenues.

There had been a considerable number of decisions on the

Lord Blackburn.

poor-rate, which laid down a much wider principle than that laid down in *Rex* v. *Cook* (1), namely, that whenever property was occupied for "public purposes" it was exempted from poor-rate. In the *Mersey Docks* v. *Cameron* (2) it was decided by this House that the exemption to such an extent could not be supported. But, whilst this was decided, it was not said that all the cases which established exemptions on the ground indicated in *Rex* v. *Cook* (1) were wrong. The passage, at pages 464, 465, in the opinion of the majority of the judges, which I delivered, and which has been so often quoted, shews that those who joined in that opinion thought that many of them, such as those deciding that buildings occupied by the Post Office, the Horse Guards, or the Admiralty, were exempt, were obviously right, and that those which decided that buildings occupied for police and for the assize courts were exempt, though not so obviously right, were capable of being supported on a ground that did not touch the case then before the House. I do not think that opinion can be properly cited as an authority that those cases were rightly decided, but certainly their authority was not weakened by anything said in that opinion.

The House, in *Mersey Docks* v. *Cameron* (2), did not decide that those cases to which I have referred were rightly decided; but the language of the Lord Chancellor (Lord Westbury) at p. 505, seems to me to add to their authority. He there says that the public purposes to make an exemption "must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown;" and in *Greig* v. *University of Edinburgh* (3) he more clearly shews what was his view by using this language, "property occupied by the servants of the Crown, and (according to the theory of the Constitution) property occupied for the purposes of the administration of the government of the country, became exempt from liability to the poor-rate." Lord Cranworth (4), by using the words "more or less sound," seems to me to guard against being supposed to decide that those cases which proceeded on this ground were all right in deciding that the purposes were those of

(1) 3 T. R. 519.

(2) 11 H. L. C. 443.

(3) Law Rep. 1 H. L., Sc. 354.

(4) 11 H. L. C. 508.

the public government, to such an extent as to bring them within the principle of *Rex* v. *Cook* (1); but he certainly does not at all impeach them.

The Scotch cases on the Scotch poor law proceed on a similar ground. It has been pointed out that in the Scottish poor law half the poor-rate is imposed on the owner in respect of property, and so far the case is more closely analogous to that of the income tax; but I think that whether the rate is exigible in respect of property, or in respect of occupation, the ground of exemption must be the same, viz., as said by the Lord Chancellor (Cairns) in *Greig* v. *University of Edinburgh* (2), "The Crown not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown or of persons using it exclusively in or for the service of the Crown, is not rateable to the relief of the poor."

It was not necessary, however, to decide in that case, nor, I think, in any case in this House, that the exemption proceeded so far; all that was decided was that it did not go further. And I therefore do not think it can be considered as decided by this House that property held as this is would not be liable to the poor-rate. I think it would not be open to a Court of the first instance in England to hold that a uniform series of decisions extending over many years, and certainly not impeached, if not confirmed by this House, are wrong, but it is open in this House to say so. But I cannot see sufficient reason for saying that they are wrong. I do not say that the assize courts, maintained by the county for the administration of the Queen's justice in the Queen's Court, are quite so clearly occupied by the servants of the Crown as those courts which are maintained by the Woods and Forests out of the general revenue of the country. Nor do I say that the police station, maintained by the county for the maintenance of the police, is quite so clearly occupied by the servants of the Crown as a barrack maintained for soldiers, and paid for out of the general revenues of the country. But I think there is great reason for saying that both are maintained for the

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(1) 3 T. R. 519.

(2) Law Rep. 1 H. L., Sc. 350.

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purposes of the administration, or those purposes of the Government which are, according to the theory of the Constitution, administered by the Sovereign.

If it was a new point whether buildings occupied for the purpose of county courts and county police were liable to be rated for the poor-rate, I think there would be considerable force in the argument that the county, occupying property in order to fulfil a duty to the Crown, which it is required to fulfil at its own expense, is not occupying it for the Government, or in the service of the Government. But as for many years property thus occupied has been uniformly held exempt from the poor-rate, I do not think your Lordships ought now to hold that it is liable to poor-rate.

It remains to be considered whether, if the county is not liable for poor-rate in respect of the occupation, it may not be liable to the income tax in respect of the property, or the occupation.

The decision of the First Division of the Court of Session in *Clerk* v. *Dumfries Commissioners of Supply* (1) was much and properly relied on by the counsel for the appellants. There the question was whether the commissioners of supply were chargeable with income tax in respect of police stations erected under the 20 & 21 Vict. c. 72. If there be any difference between such police stations in Scotland erected by commissioners of supply, and those erected by the county authorities in England, it has not been pointed out, and I have not discovered it. The decision was that they were chargeable; and it certainly seems to me that the decision in the case at bar, as least so far as regards the police stations, and that Scotch decision, cannot both be right. It must be for your Lordships to determine which you will follow.

The Lord President gives us the reasons:—" It appears to me to be impossible to say that in charging income tax against this property any charge is made against the Queen, or the Queen's Government. The charge is made against a certain public body administering the statute for local purposes, and as part of the local government; and I know no ground upon which it can be said that property so occupied is exempt from income tax. Indeed I should say that it is impossible to hold that, unless you could find within the Income Tax Acts themselves some clause of exemption. I take no account of that class of cases which has been referred to, and upon which the argument of the respondents mainly turned, viz., those cases in which certain premises have been found not liable in poor-rates, or other local assessments of that kind, because I think those cases have no application to a question under the Income Tax Acts."

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(1) 7 Court Sess. Cas. 4th Ser. 1157.

I have great respect for the opinion of the Lord President, and he having said (though without giving his reasons) that in his opinion the poor-rate cases are not applicable, I have reconsidered the reasons which make me think them in point; and I have been unable to change my opinion. It seems to me that it is not material whether the assessment statute imposing any tax does so, like the Poor-rate Acts, for a local purpose, or like the statute imposing a duty on post-horses, considered in *Rex* v. *Cook* (1), or the income-tax, for an imperial purpose. In each there is an implied exemption on the ground of prerogative. And if the property is so held as to bring it within the ground of exemption for the one statute, it must surely be brought within the ground of exemption for the other.

I think, therefore, that your Lordships must either hold that this property here is liable to be rated for the relief of the poor, or that it is not liable to be taxed for income tax.

The Lord President says that the county police is a local purpose, and one of the local government. If this were so it would be a reason for holding the premises assessable to both the poor-rate and the income tax. But I think Mr. Gorst, in his argument, gave the answer to that. The general Government administers law and justice, and keeps order; but it necessarily does it in different localities separately. If Berkshire or Dumfriesshire were suffered to get into lawless anarchy, every part of the empire would suffer, more or less directly according to their vicinity. It is a purpose of the imperial Government, carried out in a particular locality, but not the less a purpose of the imperial Government.

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(1) 3 T. R. 519.

I do not think it necessary to say anything on what I may call the technical answers, on which the respondents' counsel, and I think (to some extent) Brett L.J. relied. I do not much doubt that, if the premises were taxable, means would be found for obtaining payment.

But the Attorney-General argued that, even if property held exclusively for the purposes of assize courts, etc., were not taxable, here there was, or (if the justices did their duty) would be, a surplus revenue, and for that there ought to be a tax. But the Court are to decide only the questions of law arising on the case. The question whether any extra revenue was raised is a question of fact, and the case expressly finds that there was none. It is also a question of fact whether, the premises being as they are, a revenue could be and ought to be raised from them, by taking payment for uses to which, when the assizes are not sitting, the courts might be applied. The utmost that the case finds on this is that there was some evidence from which might have been drawn an inference of fact that it was so. The commissioners neither drew that inference nor were asked to do so, and I do not think the Court on this case can do so.

The result is that I advise your Lordships to affirm the order appealed from, with costs, and I move accordingly.

LORD WATSON:—

My Lords, I also am of opinion that the premises in question are not assessable to income tax.

I entertain no doubt that the occupiers of buildings used as courts of assize, or as county police stations, are within the privilege of the Crown and are therefore not liable to be rated under the 1st section of the Act of the 43 Eliz. c. 2.

In the case of *The Mersey Docks* (1) my noble and learned friend (Lord Blackburn), delivering the opinion of five of the consulted judges, said: "Long series of cases have established that where property is occupied for the purposes of the Government of the country, including under that head the police and the administration of justice, no one is rateable in respect of such

(1) 11 H. L. C. 464.

occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of State, such as the post-office, *Smith* v. *Birmingham* (1); the Horse Guards, *Lord Amherst* v. *Lord Somers* (2); or the admiralty, *The Queen* v. *Stewart* (3), in all which cases the occupiers might strictly be called the servants of the Crown; but also to property occupied by local police, *Justices of Lancashire* v. *Stretford* (4); to county buildings occupied for the assizes, and for the judge's lodgings, *Hodgson* v. *Local Board of Carlisle* (5); or occupied as a county court, *The Queen* v. *Manchester* (6); or for a jail, *The Queen* v. *Shepherd* (7). In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes of that kind which, by the constitution of this country, fall within the province of government, and are committed to the Sovereign; so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered in consimili casu. And the decisions are uniform, and were not disputed at the bar, that the exemption applies so far; but there is a conflict between the decisions as to whether the exemption goes farther."

It was, no doubt, unnecessary for the overseers in *The Mersey Docks Case* (8) to impeach the consistent series of authorities referred to by my noble and learned friend in the passages which I have just read. It was sufficient for them to establish that occupation for what were strictly speaking public, though in no sense Government, purposes, was not, as regarded exemption from the poor-rate, in pari casu with the occupation of the Crown, a matter in regard to which the decisions of the Courts below were in conflict. Neither was it necessary that the House should, in that case, decide in terms that no person was rateable in respect of the occupation of county police buildings, assize courts, or jails. But the principle upon which the House disposed of the point

(1) 7 E. & B. 483.
(2) 2 T. R. 372.
(3) 8 E. & B. 360.
(4) E. B. & E. 225.
(5) 8 E. & B. 116.
(6) 3 E. & B. 336.
(7) 1 Q. B. 170.
(8) 11 H. L. C. 443.

immediately arising for its decision appears to me to imply that their Lordships were satisfied that *Justices of Lancashire* v. *Stretford* (1), and other similar cases, were originally well decided, or had at least become an authoritative series of precedents.

The Lord Chancellor (Westbury) thus expresses what was, in his opinion, the "true criterion" of exemption from rateability when property is valuable:—"At last in the case of *Tyne Improvement Commissioners* v. *Chirton* (2) the Court of Queen's Bench recurred to that which is in my opinion the only true principle, namely, that the only ground of exemption from the statute of Elizabeth is that which is furnished by the rule, that the Sovereign is not bound by that statute, and that consequently when valuable property (that is, property capable of yielding a net rent above what is required for its maintenance) is sought to be exempted on the ground that it is occupied by bare trustees for public purposes the public purposes must be such as are required and created by the Government of the country, and are therefore to be deemed part of the use and service of the Crown" (3).

The precise language of that definition satisfies me that the noble and learned Lord meant to affirm, and did affirm, that the exemption extended not only to the immediate and actual servants of the Crown but to all other persons, not being servants of the Crown, whose occupation was ascribable to a bare trust for purposes required and created by the Government of the country. And seeing that, in my opinion, the administration of justice, the maintenance of order, and the repression of crime, are among the primary and inalienable functions of a constitutional Government, I have no hesitation in holding that assize courts and police stations have been erected for proper government purposes and uses, although the duty of providing and maintaining them has been cast upon county or other local authorities.

Lord Chelmsford does not, indeed, say that those cases (which were not conflicting) were originally well decided; but I conclude, from the terms in which he refers to the opinion of

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(1) E. B. & E. 225.

(2) 1 E. & E. 516.

(3) 11 H. L. C. 504.

Tindal C.J., in *Crease* v. *Sawle* (1), that, even if his Lordship had thought they were not, he would have upheld their authority. On the other hand, it appears to me that Lord Cranworth, although he does make use of the expression "more or less sound," meant to express approval of the principles upon which these cases were decided; and I am confirmed in that impression by the fact that his Lordship subsequently stated his entire agreement with the opinion of the Lord Chancellor (Cairns) (which has already been cited by my noble and learned friend) in *Greig* v. *University of Edinburgh* (2). The rule laid down by Earl Cairns in that case is, in substance, the same as that stated by Lord Westbury in the case of *The Mersey Docks* (3).

It was argued however that the authorities to which I have referred have no application to the question with which the House has to deal, for two reasons: first, because the assessment for the relief of the poor is imposed upon occupation, whereas property is the basis upon which the income tax is levied; and, in the second place, because the ratio of these authorities is limited to the case of a local rate and ought not to be extended to the case of an imperial tax.

I confess that I had great difficulty in following the argument founded upon the supposed difference in principle (as regards the limits of Crown privilege) between an assessment on occupation and an assessment on property. I did not hear from the bar, and I have been unable to discover for myself, any good reason why a person vested with the legal estate, but whose right is that of a bare fiduciary holding the premises for proper government uses, should be less entitled to plead the privileges of the Crown than one who occupies for the same purposes. In *Clyde Navigation Trustees* v. *Adamson* (4), which was decided upon the same day on which judgment was given in *The Mersey Docks Case* (3), the trustees were the legal owners as well as occupiers of the premises sought to be rated to the poor by the city parish of Glasgow, and they claimed exemption on the ground that any property vested in them was so vested in them as trustees for public purposes. The Lord Chancellor (Westbury),

(1) 2 Q. B. 885.

(2) Law Rep. 1 H. L., Sc. 348.

(3) 11 H. L. C. 443.

(4) 4 Macq. 931.

Lord Watson.

in his judgment, points out that by the General Poor Law Act for Scotland (8 & 9 Vict. c. 83) the assessment is imposed, one half upon owners and one half upon the tenants and occupants of all lands and heritages within the parish; and his Lordship then goes on to state that the question raised by the trustees, in answer to the demand that they should be rated for the poor, was "precisely the same as the question raised by the Mersey Docks and Harbour Trustees." The same view was taken by the House in the subsequent Scotch case of *Greig* v. *University of Edinburgh* (1).

But it was next said that all the decisions founded on by the respondents, in which the occupiers of property used for quasi Government purposes have been held exempt from taxation, refer to local rating for the poor, and therefore decide nothing as to exemptions from general rates, such as the income tax. It was accordingly argued for the appellant that your Lordships are free in this case to consider all questions as to the proper extent and limit of Crown privilege, as if these had now arisen for the first time for decision. The statement, in point of fact, upon which that argument was rested is not strictly accurate, because, as has been pointed out by my noble and learned friend, the Court, in *Rex* v. *Cook* (2), gave effect to the privilege of the Crown, not in the case of a local but of a general tax, holding that such privilege extended not only to the Act of Elizabeth, but to every Act imposing a tax upon the subjects of the Crown. But I should have been prepared to hold, apart from the authority of that case, that the appellant's contestation upon this point is untenable.

The exemption of the Crown from the incidence of rating statutes is a general privilege, and is nowise dependent upon the local or imperial character of the rate. It takes effect in all cases when the Crown is not named in the statute, or, I should prefer to say, in all cases where the enactments do not take away the privilege, either in express terms or by plain and necessary implication. There is not, in my opinion, one kind of Crown exemption from the Statute of Elizabeth, and another kind of Crown exemption from the Income Tax Acts. In other words,

(1) Law Rep. 1 H. L., Sc. 348.

(2) 3 T. R. 519.

it appears to me that the existence of the same kind and degree of interest, on the part of the Crown, which is deemed in law sufficient to protect an occupier from liability to the poor-rate, must also be held sufficient to shield the owner of the bare legal estate against any demand for payment of income tax. The judgment of a court of law to the effect that certain public purposes are such as are required and created by the Government of the country, and must therefore be deemed part of the use and service of the Crown, is a decision resting upon grounds altogether outside and independent of the provisions of the Act of Elizabeth, and, so far as I know, of any other taxing Act to be found in the statute book. I therefore think that the cases in which it has been decided that the actual occupiers of assize courts and police stations are exempt from poor-rate, as being within the privilege of the Crown, are decisions of equal authority in a question as to exemption from income tax. I cannot conceive that what must be held to be a proper Government use, for the purpose of determining the incidence of the poor-rate, or any other local rate, should be held to be a use unconnected with the Government of the country in determining the incidence of the income tax.

Your Lordships were referred in the course of the argument to the case of *Clerk* v. *Dumfries Commissioners of Supply* (1), which was decided by the First Division of the Court of Session in the year 1880. After careful examination, I am satisfied that the circumstances of that case raise the precise question which your Lordships have now to decide, and, consequently, that, in the event of your Lordships holding the decision of the Lords of the First Division to be right, there would remain no alternative in the present case except to give judgment for the appellant. For the reasons which I have already endeavoured to indicate, I am of opinion that *Clerk* v. *Dumfries Commissioners* (1) was not rightly decided, and I have the less hesitation in differing from the learned Judges of the Court of Session, seeing that their judgment appears to rest mainly on the assumption that the cases establishing immunity from poor-rates have no application to a question under the Income Tax Acts, and that an owner who could plead the privilege of the Crown against payment of a local assessment cannot on the same ground resist payment of an imperial tax. It would have been more satisfactory had their Lordships explained the reasons upon which that assumption was made. The Lord President observes that "it is impossible to say that, in charging income tax against this property, any charge is made against the Queen or the Queen's Government." That is unquestionably true; but it is equally impossible to say that, if the owners and occupiers of county police stations were held to be liable to assessment for the poor, the rate would be a charge against Her Majesty or her Government.

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(1) 7 Court Sess. Cas. 4th Ser. 1157.

I do not think it necessary to notice in detail the alternative argument, addressed to the House by counsel for the respondent, founded on the circumstance that, under the Income Tax Acts, property is the subject of assessment, the owner being ultimately liable, whilst the tax is made directly payable by the occupier. The argument was carried the length of maintaining that the owner could not be made liable if the occupier was not a rateable person, but I am by no means satisfied that if A. were to let his property for Government use to the head of one of the great departments of the State, for a substantial rent, he would escape from payment of the income tax, because his tenant was exempt from all taxation. I desire to add that I do not concur in many of the observations that were made upon this part of the case by some of the learned Judges in the Courts below.

In the event of judgment going against him upon the main questions raised by his appeal, the appellant maintained that he was entitled to have a finding from your Lordships to the effect that part of the premises in question have an assessable value, seeing that the county hall, and certain apartments connected with it, are only temporarily required for assize purposes, and are capable of being let at other times. I am certainly not prepared to hold that the duty laid upon county authorities of providing suitable accommodation for Her Majesty's courts of assize carries with it an implied statutory prohibition against letting for profit, at seasons when such accommodation is not required for government purposes. Whether any part of the premises in question could be so let by the respondents, consistently with fair and reasonable administration of their public trust, is a question to which the case before us affords no materials for an answer. Besides, the question is not one of law for the consideration of this House, but one of fact, which must be determined by the Income Tax Commissioners.

I therefore am of opinion with your Lordships that the judgment of the Court of Appeal ought to be affirmed, with costs.

LORD BRAMWELL:—

My Lords, I am of the same opinion, and after what has been said I need add but little. When the Courts had first to consider the question of liability to the poor-rate of property, its owners and occupiers being such as those under consideration, I suppose it seemed unreasonable to them that such property should pay rates, there being no profitable occupation for private purposes, and they found or made a reason for its exemption. Whether they were right may be doubtful. The poor-rate is local. Whatever exempts part of the property in a rated locality adds to the burden on the rest, and there is this additional hardship, that the exempted part may increase the burden itself by adding to the numbers chargeable on the rate. Moreover, the reasoning on which the exemption was founded may be doubtful. But it is the law; the law as confirmed in this House by the reasoning in the *Mersey Docks Case* (1).

I agree with my noble and learned friend (Lord Watson) that "the cases in which it has been decided that the actual occupiers of assize courts and police stations are exempt from poor rate as being within the privilege of the Crown are decisions of equal authority in a question as to exemption from income tax. I cannot conceive that what must be held to be a proper Government use for the purpose of determining the incidence of the poor-rate or any other local rate should be held to be a use unconnected with the Government of the country in determining the incidence of the income tax." This is my ratio decidendi. Indeed I think the case is one à fortiori. For, as I have said, there is some hardship in exempting any property from a local rate, there is none in exempting from a general tax a class of property everywhere within the range of that tax. The payers and receivers of poor-rate are not the same. If the Crown paid income tax it would be at once payer and receiver. And indeed in one view the question is unimportant. For if this kind of property pays everywhere, a less rate of income tax will be necessary and a greater local rate everywhere. Whereas by our decision more income tax may be required and less local rate. And this is what many people think desirable.

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(1) 11 H. L. C. 443.

Like my noble friend opposite (1) I am by no means satisfied that if this property was leasehold the owner of the rent paid for it would not be liable to income tax.

I also desire to add that I see no reason why this property should not be used for purposes other than but not inconsistent with its primary objects. The doctrine of ultrà vires has done mischief enough; I am not prepared to extend it.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 3rd December 1883.

Solicitor for appellant: *W. H. Melvill, Solicitor of Inland Revenue.*

Solicitors for respondents: *Newman, Stretton, & Hilliard.*

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(1) Lord Watson.

[HOUSE OF LORDS.]

DAVID LYELL . . . . APPELLANT; H. L. (E.)

AND 1883

JOHN LAWSON KENNEDY . . . . . RESPONDENT. Dec. 7.

(No. 2.)

Discovery — Interrogatories — Privileged Communication — Belief founded on Privileged Communications.

A party to an action cannot be compelled to answer interrogatories asking as to his knowledge, information, or belief with regard to matters of fact, if he swears that he has no knowledge or information with regard to those matters except such as he has derived from privileged communications made to him by his solicitors or their agents; for since under those circumstances his knowledge and information are protected, so also is his belief when derived solely from such communications.

The plaintiff having been interrogated as to his knowlege, information and belief upon matters relevant to the defendant's case answered that he had no personal knowledge of any of the matters inquired into; that such information as he had received in respect of those matters had been derived from information procured by his solicitors or their agents in and for the purpose of his own case:—

Held, affirming the decision of the Court of Appeal, that the answer was sufficient.

APPEAL from an order of the Court of Appeal (Baggallay and Cotton L.JJ.) (1).

On the 4th of January 1881 the appellant brought an action against the respondent to recover certain lands. The nature of that action appears from the report of *Lyell* v. *Kennedy* (2).

The present action was brought on the 21st of June 1881 by the respondent against the appellant, the statement of claim alleging that a conveyance of the same lands, made on the 24th of December 1880 by certain persons as alleged co-heiresses of Ann Duncan, to the appellant, was a bargaining, buying &c. of a pretended right or title within 32 Hen. 8 c. 9, and claiming the forfeitures and penalties imposed by that statute. The statement

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(1) 23 Ch. D. 387.

(2) 8 App. Cas. 217.

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of defence alleged that Ann Duncan was during her life entitled to the fee simple of the lands in possession and that the respondent had been in possession of the lands since Ann Duncan's death as the trustee, agent and receiver for her heirs, and that the appellant was entitled to the lands under the conveyance of the 24th of December 1880.

The appellant administered thirty-one interrogatories to the respondent, of which the 3rd interrogatory and the first ten sub-sections of the 31st are alone material. They are set out in the report of the case before the Court of Appeal (1). For the present report it suffices to say that they asked as to the death of Ann Duncan, and other facts relevant to the pedigree of the alleged co-heiresses and to the appellant's own title; and whether the respondent had not made searches and inquiries about the matters inquired after; and also as to the respondent's knowledge, information and belief (and the sources thereof) upon the matters inquired after.

The respondent's answer after giving certain information about Ann Duncan was as follows:—"Except as aforesaid, I have no personal knowledge of any of the matters inquired after by the 3rd interrogatory or the first ten subsections of the 31st interrogatory. Such information as I have received in respect of the said matters other than as aforesaid has been derived by me from information procured by my solicitors or their agents in and for the purpose of defending my title to the said hereditaments, and I submit that I ought not to be required to make any further answer to the said 3rd and 31st interrogatories."

The Court of Appeal held this a sufficient answer (2). Other answers to other interrogatories were also the subject of the present appeal, but as they raised no question of principle it is not necessary to refer to them.

Dec. 5, 6, 7. *MacClymont* and *Robert Wallace* for the appellant:—

The decision under appeal is wrong; the interrogatories must be fully and sufficiently answered. There is no such privilege

(1) 23 Ch. D. 389–391.

(2) 23 Ch. D. 387.

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as that claimed by the respondent. The object of discovery is to ascertain the state not merely of the party's consciousness, but of his conscience. Equity considered it against conscience that a party should put his opponent to the expense of proving facts which he knew to be true, or to enforce a claim or defence to the justice of which he was not willing to pledge his oath: however fatal to his own claim he must set forth all he knows, *believes* or *thinks* in relation to the matters in question": *Flight* v. *Robinson* (1); *Pearce* v. *Pearce* (2); *Greenhough* v. *Gaskell* (3); *Greenlaw* v. *King* (4); *Manser* v. *Dix* (5); Wigram on Discovery, pl. 345. The state of a party's conscience cannot depend upon the source from which he derives his information and belief. The privilege claimed is contrary to the very principle on which the whole equitable right to discovery was founded. The privilege is also untenable having regard to the former pleadings in equity, the abolition of which has not abridged the right to discovery. If the facts stated in these interrogatories had been stated in a bill, the respondent must have answered them on oath. He could not have said to his opponent, "Prove your case." The information which the respondent's solicitor has obtained must have been from extraneous sources, and such information is not privileged; the solicitor could have no privilege, neither could the client: *Sawyer* v. *Birchmore* (6); *Bramwell* v. *Lucas* (7); *Ford* v. *Tennant* (8); *Spenceley* v. *Schulenburgh* (9); *Gore* v. *Bowser* (10); *Marsh* v. *Keith* (11); *Duchess of Kingston's Case* (12); *Mackenzie* v. *Yeo* (13); *Mayor of Dartmouth* v. *Holdsworth* (14); *Lewis* v. *Pennington* (15). So a solicitor has been held to have no privilege where he obtained information from a third party or his opponent in the presence of his client: *Griffith* v. *Davies* (16); *Gillard* v. *Bates* (17); *Weeks* v.

(1) 8 Beav. 22, 33–36.
(2) 1 De G. & Sm. 12, 26.
(3) 1 My. & K. 98, 100.
(4) 1 Beav. 137, 143, 144.
(5) 1 K. & J. 451, 454.
(6) 3 My. & K. 572.
(7) 2 B. & C. 745.
(8) 32 Beav. 162, 167.
(9) 7 East, 357.
(10) 5 De G. & Sm. 30.
(11) 1 Dr. & Sm. 342.
(12) 20 How. St. Tr. 613, 614.
(13) 2 Curt. 866.
(14) 10 Sim. 476.
(15) 29 L. J. (Eq.) 670.
(16) 5 B. & Ad. 502.
(17) 6 M. & W. 547.

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Argent (1); *Desborough* v. *Rawlins* (2); *Brown* v. *Foster* (3). The same rule must apply where the solicitor first obtains the information and then repeats it to his client; if the solicitor is not privileged the client cannot be, as the privilege is his. All the cases shew that the only information that is privileged is that which is obtained by a solicitor from his client; there is no corresponding privilege where the client obtains his information as to facts from his solicitor. A written instrument procured by a solicitor for the purpose of his client's case has been held not to be privileged: *Balguy* v. *Broadhurst* (4); and there is no difference between written and verbal information: *Pavitt* v. *North Metropolitan Tramways Company* (5). The Court of Appeal admitted that though a report made by a solicitor to his client might be privileged there would be no privilege as to matters of fact contained in the report, and refused discovery on the ground that the matters inquired for were not matters of fact. If they are matters of fact (as they are) the appellant is entitled to discovery: *Southwark Water Company* v. *Quick* (6); *English* v. *Tottie* (7). The presumption is in favour of discovery, and there is no instance of such a privilege having been either claimed or allowed.

Horton Smith Q.C. and *O. L. Clare* for the respondent contended that the answer was sufficient, and referred to *Flight* v. *Robinson* (8); *Greenlaw* v. *King* (9); *Manser* v. *Dix* (10); and *Penruddock* v. *Hammond* (11).

MacClymont replied.

LORD BLACKBURN:—

My Lords, this case has occupied a good deal of time, and a vast number of cases have been cited; but, as it seems to me, most of them are authorities upon matters which nobody would dispute, or for propositions which are not involved in the question in controversy before us, and I cannot help thinking that there is no occasion to notice any of them.

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(1) 16 M. & W. 817.
(2) 3 My. & Cr. 515.
(3) 1 H. & N. 736.
(4) 1 Sim. (N.S.) 111.
(5) W. N. (1883) 100.
(6) 3 Q. B. D. 315.
(7) 1 Q. B. D. 141.
(8) 8 Beav. 33.
(9) 1 Beav. 337.
(10) 1 K. & J. 451.
(11) 11 Beav. 59.

The action is a very peculiar one. It is brought on the statute 32 Hen. 8 c. 9, the plaintiff claiming, as a common informer, the penalty of half the value of the estate, upon certain alleged grounds. Mr. Wallace pointed out that there were objections to the action; he urged that the statute having said that the common informer might recover this penalty by an action of debt, there was an objection to its being recovered, or a doubt whether or no it could be recovered, in this suit which has been brought in equity. But as that objection is coming hereafter, it is unnecessary to express any opinion upon it now.

The defendant, as he was entitled to do, pleaded or made a statement of defence to that action, and in that statement of defence he raised two main grounds, which were these: first, that the title which he purchased was not a pretended title, but a real and true title; and, secondly, that the owners were not out of possession at the time, for the plaintiff's possession was theirs and he held as agent for the heirs of Miss Duncan. I think that it would be premature to express any opinion one way or the other as to these defences being good defences or not, further than to say that there they are, and that they are so plausible and strong that they are defences which the defendant is entitled to prove.

Now that brings me to what is the real matter before us. The defendant having set up a title as a defendant, just as the plaintiff has set up a title as a plaintiff, he is entitled to discovery and interrogatories in aid of his title; and I take it to be tolerably clear and certain that as to that he is entitled to discovery of all that is in the knowledge of the other side, whom he is interrogating, and would really be material to support the case of a person asking for discovery, and that he is entitled, as it has been phrased, to search the plaintiff's conscience, and to ask him not merely as to what he may himself have seen, or may himself know, but as to all the facts which he has and all the information which he has for forming a knowledge and belief, derived from his agent. That is the general rule, although there are a great many niceties and technicalities upon it which it is not necessary to notice here.

This rule is equally well established, namely, that the law of England, for the purpose of public policy and protection, has from very early times said that a client may consult a solicitor (I mean a legal agent) for the purposes of his cause, and of litigation which is pending, and that the policy of the law says that in order to encourage free intercourse between him and his solicitor, the client has the privilege of preventing his solicitor from disclosing anything which he gets when so employed, and of preventing its being used against him, although it might otherwise be evidence against him.

This further rule has been established, that the other side is not entitled, on discovery, to require the opponent to produce as a document those papers which the solicitor or attorney has prepared in the course of the case, and has sent to his client. They may be very relevant; but just because they are very relevant they are not to be produced when they amount to that. To put it in a short way, the privilege may extend to many things which do not amount to that; but when a solicitor, having made inquiry as to everything which is going on, and having prepared the case, has written out a brief, and sent it to his client, I think it must be considered as perfectly well settled that the other side is not entitled to say, "Shew me that brief which you have got from your attorney." He may shew it if he pleases; but it is a good answer to a discovery to say, "It was prepared for me by my legal adviser, my attorney, confidentially, and it is my privilege to say that you shall not read it;" and I think that it was hardly disputed that on a discovery of documents you could not discover that brief.

But then it is argued that though that is so you may, as has been repeatedly said, search the conscience of the party by inquiring as to his information and belief from whencesoever derived, and that it consequently follows from that (this I think was the argument which was put) that although a brief has been refused, and it has been said, "You must not inspect that brief," you are nevertheless entitled to ask the party himself, "Did not you read the brief, and when you had read it what was your belief derived from reading that brief?" That, I think, was the position which was taken; and it was argued in support of it, if

I understood and followed the argument rightly, that inasmuch as nobody had ever actually raised the point, and inasmuch as in all the different books of pleading and other things, where they very frequently do discuss what is the extent of discovery, nobody had hitherto discussed this point either one way or the other, the silence of people implied that it should be so, and that you ought to be able to put that question. Now as to that I believe that there is no authority, and I think that Cotton L.J. says that there is no authority; but as it seems to me the plain reason and sense of the thing is that as soon as you say that the particular premises are privileged and protected, it follows that the mere opinion and belief of the party from those premises should be privileged and protected also. I do not mean to state (and I mention it in case I should be misunderstood) that a man has a privilege to say, "I have a deed, which you are entitled to see in the ordinary course of things, but I claim a privilege for that deed, because it was obtained for me by my attorney in getting up a defence to an action," or "in the course of litigation." That would be no privilege at all. So again with regard to another fact, such as a man being told by an attorney's brief that there is ground for thinking that there is a tombstone or a pedigree in a particular place—if the man went there and looked at it and saw the thing itself I do not think that he would be privileged at all in that case: because it is no answer to say, "I know the thing which you want to discover, but I first got possession of the knowledge in consequence of previous information." That is not within the meaning of privilege. But when the interrogatory is simply "what is the belief which you have formed from reading that brief?" it seems to me (and I think that that is the effect of what Cotton L.J. says at the end of his judgment (1)) to follow that you cannot ask that question. It is a new point; it has never been raised before; but it seems to me that that is right.

In his answer to interrogatories 3 and 31 the plaintiff says, "Ann Duncan died at Balchrystie on or about the 5th day of November 1867 without ever having been married, and I believe that she was the daughter of David Duncan of Balhousie," and then he says, "Except as aforesaid I have no personal knowledge of any of the matters inquired after by the 3rd interrogatory or the first ten sub-sections of the 31st interrogatory. Such information as I have received in respect of the said matters other than as aforesaid has been derived by me from information procured by my solicitors or their agents in and for the purpose of defending my title to the said hereditaments, and I submit that I ought not to be required to make any further answer to the said 3rd and 31st interrogatories." Now we know that there was and is an action of ejectment pending by this very person who is now defendant against him, and that he would naturally employ a solicitor or attorney to make inquiries, and in fact to get up a brief. The first question really is, Does this amount to saying, "All my knowledge and information on these points is derived from reading the brief"? I think that it does; I think that that is the fair and intelligible meaning of it, and that consequently the privilege claimed is good as far as it goes. If there was any ground for saying that there was something which pointed to the fact that the attorney in his researches had found a pedigree in Ann Duncan's repositories in which it was stated who were her next heirs, I do not think that he would be allowed to refuse it; but I cannot find anything, and I do not think that there is anything, which would lead your Lordships to suppose that such was the case. Therefore upon the point whether or not that answer was sufficient, I am of opinion (and I advise your Lordships to come to the same conclusion) that the Court of Appeal were right in deciding that no further answer was required.

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(1) 23 Ch. D. at p. 408.

[After dealing with the other answers to other interrogatories which are not the subject of this report, and saying that in his opinion the order of the Court of Appeal should be varied as to them by requiring the respondent to answer them, the noble Lord proceeded as follows:—]

The appeal is partially successful and partially not. It has failed upon the question which has been mainly argued below, and which has been mainly argued now. I think that there is no great merit on either side—perhaps (to borrow a phrase which I think was once used by a great judge) there is a contest of demerits upon both sides; but still the matter remains thus, that the appeal here is partially successful and partially not; and that being so, I think that as the order appealed against is to be varied each party should pay his own costs of the appeal, and I so move your Lordships.

LORD WATSON:—

My Lords, I am of opinion that in the present case it is quite foreign to the duty of this House to determine questions of law which may possibly arise (questions of great importance and nicety) at the trial of this action. A certain defence in law, founded upon allegations of fact made in his pleadings, is set up by the present appellant, and he is entitled to prove these allegations in order to raise the defence which he has stated. If he fails to prove his allegations, cadit quæstio; but if these are made out, it will then, and not till then, become the duty of the Court to consider how far his pleadings in point of law are relevant or sufficient to afford a defence to this action.

Questions of various kinds have been largely discussed at the Bar. Undoubtedly the most important of them relates to the plea of privilege which is taken by the respondent in regard to certain queries which have been put to him. Now, on looking at the subject-matter of the 3rd and the first ten sections of the 31st interrogatory it is very obvious in the first place that these relate to matters not necessarily within the personal knowledge of this plaintiff; and in the second place they are not matters in regard to which there is any duty upon the plaintiff to inform himself before answering the interrogatories put to him. In many of the cases which were cited at the Bar there was such a duty.

But in the present case the first and most important question is, Quid juratum? What is the real substance of the answers which have been given to these interrogatories touching matters, as I have said, not personally within the cognisance of this gentleman? Now it appears to me that the substance of the answers given by him to these interrogatories is not doubtful. He says, "I have no personal knowledge, but I have certain information derived from communications oral or written" (it does not seem

Lord Watson.

to me to matter which in this case) "with my solicitor, and I have no other information or means of forming a belief." That appears to me to be quite sufficient to protect him from discovery either of the belief which he entertains, if he entertains any decided belief, or of the information upon which that belief is founded.

The general principle of law relating to the protection of communications passing between a client and his agent was very well stated by the late Vice-Chancellor Kindersley in the case of *Lawrence* v. *Campbell* (1). He says, "The general principle is founded upon this, that the exigencies of mankind require that in matters of business which may lead to litigation men should be enabled to communicate freely with their professional advisers, and their communications should be held confidential and sacred, and that no one should have a right to their production." And again the learned Vice-Chancellor observes, "It is not now necessary, as it formerly was, for the purpose of obtaining 'protection'" (the word is printed "production" but it clearly ought to stand "protection") "that the communications should be made either during or relating to an actual or even to an expected litigation. It is sufficient if they pass as professional communications in a professional capacity." And that statement of the principle and the limits of the principle was approved of in terms by Lord Chancellor Selborne in the case of *Minet* v. *Morgan* (2) in the course of which case his Lordship very fully reviews the authorities, and comes to the same conclusions upon these authorities as are stated in the words I have read from the judgment of Vice-Chancellor Kindersley.

I concede that in professional contact with his agent for professional purposes, solely with a view to advice and counsel as to a coming or a pending litigation, a client may be brought into contact with evidence of such a description that his consideration of that evidence must necessarily give him information creating a belief which is, in the sense of the law, personal knowledge. It may be real and primary evidence of such a description as is calculated to beget some kind of conclusion in the mind of any intelligent individual who considers it; and when such a belief

(1) 4 Drew. 489.

(2) Law Rep. 8 Ch. 368.

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is brought home to the mind of an individual it certainly constitutes personal knowledge. Personal knowledge, according to my understanding of the expression, is not limited to that which a man sees taking place, deeds done or events occurring before his eyes, but extends to knowledge derived from that which is in itself evidence calculated to induce a reasonable belief. On the other hand mere speculative opinions, formed from statements made by his solicitor, as to what he conceives will be the import, at the trial, of depositions or of witnesses' statements, and what he believes will be the actual result of his solicitor's confidential information, are not within the category of personal knowledge: and as to his protection against discovery of such, it appears to me that there is no principle whatever upon which it can be said that a belief founded upon that fluctuating kind of information which may beget a reasonable belief in one sense of the word, is a belief which litigants entertaining it can be compelled to state.

Now, it appears to me that this respondent has in effect stated that if he has any belief at all it is such a belief as that which I have last described, and that if he entertains any settled belief (which does not appear) it is derived from information given to him at second hand in the course of communications with his solicitor, and that he has no other grounds upon which to form any conclusion at all. The interrogatories as put call upon him to state, as touching the matters in question, "whether he has received any and what information touching all or some of the matters therein referred to, and whether he believes such information to be true." Now, if the information be of the class which I think is described and pointed out by the terms of his deposition on oath, there can be no doubt that it is protected by privilege; and it would be a very singular result if, it being protected, he was still compelled to answer the query "What is your belief upon that subject?" To my mind it is just the same thing as asking him to narrate the particulars upon which it rests; because I venture to say that any one who is called upon to state his belief in respect of information which he has received, will have very great difficulty in answering that question without divulging the information which he has got. Given his belief founded upon such materials, and I do not think it will be very

Lord Watson.

difficult to infer from it what passed in his confidential intercourse with his agent. In the case where a defendant or other party to a suit is under legal obligation to state his belief, I apprehend that he must state the grounds of it. If his belief is that which his opponent desires, I dare say he will remain content with accepting it; but if his belief is different from the conclusion which his opponent is anxious to make out, the latter has a perfect right to insist upon being told the grounds on which it is founded, to test, in other words, the reality and value of that belief. In this case the proposition which appears to be maintained is this, that you cannot get the brief which was handed to him, but that you can get the opinion which he formed. Now, as I said before, I think it quite impossible to separate belief in the mind of a client and litigant, which is derived from such materials as information from his agent (it may be a written memorial, it may be partly advice and counsel), from the information itself. I cannot see upon what principle he can be called upon to state that belief whilst at the same time he is not under obligation to communicate or even to indicate any one of the grounds upon which it is founded.

Therefore, in the circumstances of this case, and having regard to the deposition of the respondent, I concur so far in the judgment which was pronounced in the Court below. As to the other interrogatories I entirely agree in the view already stated by the noble and learned Lord on the woolsack, as well as in the observations which he has made on the miserable character of the litigation before the House, and upon the conduct of the parties in carrying on that litigation; and I concur in thinking, that, although with regard to the larger question success has been with the respondent, the question of costs will be very properly dealt with by leaving each party to bear his own.

LORD BRAMWELL (after pointing out that certain other interrogatories which are not the subject of the present report had not been answered and must be answered, proceeded as follows):—

My Lords, with respect to interrogatories 3 and 31 I am of opinion that the reason given for not answering them is sufficient; and my reasons are very much those of my noble and learned friend opposite (Lord Watson). The questions really put to the plaintiff are the following "What are your knowledge, information, and belief" upon such and such matters? The plaintiff says "Personal knowledge I have none; information I have none except that which has been derived from privileged and confidential communications from my solicitor;" therefore belief he can have none except that which is founded upon that information. Now how can it possibly be held that not being bound to give the information he is nevertheless bound to state his belief which is founded upon it? How can that be? It would be most unreasonable to hold that he was bound so to do; and I think it may be shewn in this way. A man surely would be at liberty, if he was bound to state his belief, to state his reasons for it, and to say, "That is my belief founded upon those reasons, and upon that information which has been given to me, but I require the defendant to prove his case by something other than my belief. My belief may be primâ facie evidence when we get before a jury, or before the tribunal which is to decide the matter, for aught I know, but still I desire it to be open to me, because the information given to me may not be accurate; the jury may not adopt it; they may think that I have drawn a conclusion unfavourable to myself without sufficient reason for doing so"—but he cannot avail himself of that right without stating what the information was. If therefore you compelled a man to state his belief founded upon privileged information, you would be depriving him of a right which he would have if his information had been of a different character, not privileged; unless he gave up his right to withhold the privileged communication. It appears to me, therefore, upon the reason and principle of the thing, that a man ought not to be called upon to state what his belief is, founded upon information, which information is privileged, and which he is not bound to disclose. It is always dangerous to lay down general propositions of that sort, and I should rather like to limit my observations to the particular case before us; because one can conceive the possibility of a case such as this. A man may be asked, "What is your information and belief as to there being a tombstone in a certain churchyard with a certain inscription upon it?" It may possibly be that his

Lord Bramwell.

information upon the subject is of a privileged character; nevertheless he might be bound to state his belief. I do not say that he would be so bound. I have the greatest misgiving about it, because even there what he might say is, "I have been told, but I may have been misinformed." I, therefore, doubt it very much even in that case. But I desire to do no more than to deal with the particular case before us, or with cases of precisely the same character.

With respect to the costs, I think it is very reasonable that each party should pay his own.

Order appealed from varied by requiring the respondent to file a further and better answer to certain interrogatories other than the 3*rd and first ten sub-sections of the* 31*st. Order so varied affirmed: each party to bear his own costs of the appeal to this House: cause remitted to the Chancery Division.*

Lords' Journals 7*th December* 1883.

Solicitor for appellant: *J. Balfour Allan.*

Solicitors for respondent: *Rooke & Sons, for Earle Sons & Co. Manchester.*

[HOUSE OF LORDS.]

M'LEAN . . . . APPELLANT;

AND

THE CLYDESDALE BANKING COMPANY RESPONDENTS.

H. L. (Sc.)
1883
Nov. 27.

Cheque, Negotiability of—Countermand of Drawer—Onerous Indorsee—Findings of the Court of Session on Appeal from Sheriff's Court—Judicature Act of Scotland, 1825 (6 *Geo.* 4, *c.* 120) *s.* 40—*Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 3, 73.

A banker's draft or cheque is substantially a bill of exchange, attended with many, though not all of the privileges of such; and both in England and Scotland it is as much a negotiable instrument; consequently, the holder, to whom the property in it has been transferred for value, either by delivery, or by indorsation, is entitled to sue upon it if upon due presentation it is not paid.

Per LORD BLACKBURN:—The definition given in sect. 3 of the Bills of Exchange Act, 1882, embraces in it a cheque: and that Act is declaratory of the prior law.

On a Saturday A. granted a cheque on his account with the Bank of S. for, inter alia, £250, crossed blank in favour of B. On the same day B. indorsed the cheque, and paid it into the Bank of C., of which he was a customer. The Bank of C. immediately on receipt of the cheque carried the amount to B.'s credit, and thus reduced a debit balance standing against him. On the Monday following A. stopped payment of the cheque at the Bank of S., consequently when the Bank of C. presented it, payment was refused. The Bank of C. sued A. in the Sheriff's Court for the amount. On appeal, the Court of Session found that the cheque was granted to B. to reduce the balance at his debit with the Bank of C.; that A. agreed the cheque should be so used; and that in pursuance of that agreement the cheque was indorsed to the Bank of C. and given to them as cash, and the contents being put to B.'s credit the balance at his debit was thereby reduced:—

Held, that in accordance with *Mackay* v. *Dick* (6 App. Cas. 262: statute 1825, s. 40), this House was limited to the findings of the Court of Session and the record; that the findings in fact were distinct, intelligible, and within the record; that it followed from them as a matter of law that the Bank of C. were onerous holders of the cheque, and therefore the Bank of

S. not having paid the cheque on demand, the Court below was right in holding that A. was liable.

Currie v. *Misa* (1876, Law Rep. 10 Ex. 153; 1 App. Cas. 554), commented on. *De la Chaumette* (1829, 9 B. & C. 208) explained. Dicta of the Judges in *Macdonald* v. *Union Bank* (1864, 2 Court Sess. Cas. 3rd Series, 963) approved.

W. B. COTTON was a customer of the respondents, the Clydesdale Bank, Glasgow. His account was kept at the Argyle Street Branch, and on the morning of Saturday, the 14th of January, 1882, was overdrawn. During that day Cotton paid in to the credit of his account a sum of money made up of bank notes and cheques. Amongst the latter was a cheque crossed in blank for £265 2*s.* 6*d.* This cheque was drawn by the appellant, John M'Lean, upon his account with the Bank of Scotland in favour of Cotton, who indorsed it. The respondents' branch bank on receiving the cheque placed its amount to the credit of Cotton's account, thereby extinguishing the sum overdrawn to that extent. On Monday afternoon M'Lean stopped payment of the cheque at the Bank of Scotland, and when in the usual course of business the cheque was presented, payment was refused. M'Lean having denied his liability to pay the amount of the cheque, except to the extent of £15 2*s.* 6*d.*, which he admitted he owed Cotton, this action was raised by the respondents in the Sheriff Court of Lanarkshire. The respondents pleaded inter alia :—

(Cond. III.) The said draft or cheque was indorsed by W. B. Cotton, and was by him delivered to the pursuers on or about the 14th day of January, 1882, on their paying to him the said sum of £265 2*s.* 6*d.*, or placing the same to the credit of his account, which was then overdrawn to an amount in excess of the said sum, and thereby extinguishing the said account to that extent. The pursuers are thus onerous holders of the said draft or cheque for full value.

(Cond. IV.) On the draft or cheque being presented to the Bank of Scotland in due course, payment thereof was refused. The said refusal was made on account of the defender's instructions to the said bank not to honour said cheque, and through said refusal the pursuers have suffered loss and damage to the extent of the said sum of £265 2*s.* 6*d.*

The appellant's averments with the respondents' answers thereto were as follows :—

(Stat. I.) The pursuers, through their agent, Mr. Hugh Laird, were in the habit of allowing W. B. Cotton to overdraw his account with the pursuers' branch bank on the understanding that the said account should be balanced and squared every Saturday, to enable the said Hugh Laird to make his official returns to the pursuers' head office.—(Ans. 1.) Denied. Explained that it was not necessary that the said W. B. Cotton's account should be balanced and squared every Saturday to enable the said Hugh Laird to make his official returns to the pursuers' head office.

(Stat. II.) On or about the 14th of January, 1882, the pursuers, through their agent, the said Hugh Laird, and in collusion with the said W. B. Cotton, fraudulently represented to and led the defender to believe that the overdraft would be allowed on the following Monday as usual, and consequently induced the defender to grant a cheque for the sum of £265 2*s.* 6*d.*, while settling an account of £15 2*s.* 6*d.*, which account the defender was then due to the said W. B. Cotton.—(Ans. 2.) Denied that the said Hugh Laird made any such representation as is here mentioned.

(Stat. III.) Upon the faith of the said fraudulent representation made by the pursuers through their agent, the said Hugh Laird, the defender, on the 14th of January, 1882, granted a cheque for £265 2*s.* 6*d.*, in favour of the said W. B. Cotton, or his order, crossed blank, being the amount of the said account (£15 2*s.* 6*d.*) due by defender to the said W. B. Cotton, and the sum of £250, which the defender was induced by said fraudulent representation to add to the said sum of £15 2*s.* 6*d.* as an accommodation to the said W. B. Cotton, and the pursuers' agent, the said Hugh Laird, for which cheque, to the extent of the said sum of £250, the defender received no value, and this was well known to the pursuers' said agent at the time the said cheque was lodged for collection with him as the pursuers' agent.

(Stat. IV.) On the 16th day of the said month of January the pursuers refused to grant the said overdraft, and either had or were about to suspend their said agent, Hugh Laird, thereby causing his arrangement with the said W. B. Cotton to be broken.—(Ans. 4.) Denied.

(Stat. V.) The defender, being then in the knowledge that the said W. B. Cotton would be unable to refund the said sum of £250, as arranged, if the defender permitted the said cheque to be paid, and the said fraudulent representation being in malâ fide, he immediately stopped payment of the said cheque by countermanding the said mandate or cheque to his bankers, the Bank of Scotland.—(Ans. 5.) Denied. Explained that the said Hugh Laird has made no representation to the defender.

The material plea in law for the respondents was:—

3. The pursuers being onerous holders of the said draft or cheque for full value, and the defender having stopped payment of the same to their prejudice, decree should be granted, as craved, with expenses.

The appellant's pleas in law were, inter alia:—

1. The pursuers being responsible for the acts of their said agent, and he having misrepresented that the usual overdraft would be granted to the said W. B. Cotton, thereby causing him to induce the defender to grant the said cheque, this action should be dismissed, with expenses.

4. The pursuers, not being onerous holders of the said cheque, this action should be dismissed, with expenses.

5. The pursuers having obtained the cheque founded on by collusion and fraudulent representation, this action should be dismissed, with expenses.

A proof was adduced: and on the 14th of July, 1882, the sheriff-substitute pronounced judgment, deciding against the appellant. He appealed to the sheriff and was again unsuccessful; whereupon he brought the case under the review of the Court of Session (1), who on the 2nd of March, 1883, pronounced the following interlocutor:—

Find that on Saturday, the 14th January, 1882, the defender granted to the witness W. B. Cotton, a crossed cheque drawn in his favour on the Bank of Scotland for the sum of £265 2*s.* 6*d.*, said cheque being to the extent of £250

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(1) 10 Court Sess. Cas. 4th Series, p. 719. The Lord President said:—

M'Lean came under an agreement with Cotton that the cheque should be treated as cash, or, in other words, that the cheque should be cashed by Cotton's bankers, and, having come under such an agreement, I do not think he was entitled to stop the cheque. No doubt he had the power to stop it, for the Bank of Scotland was bound to follow his instructions, but I think that in doing so he was doing a legal wrong, and acting in violation of his agreement. If the defender had been able to instruct by evidence the averments he has placed on record, the case would have assumed a very different aspect, for he says that he was induced to grant the cheque by fraudulent representations on the part of Cotton and Laird, the agent at the Argyle Street branch, who, he avers represented to him that this was a mere form to enable Laird to present the accounts of the branch to the head office in a sufficiently favourable state to escape notice, and that the overdraft which existed would be restored on the Monday morning, and that therefore the cheque would then be given back, or the amount repaid. I agree with the sheriff-substitute and the sheriff that these allegations are not only not proved, but are disproved, and that there is no ground for saying that such representations were ever made, or that there was ever any undertaking on the part of the bank that the overdraft would be continued the next week.

Lord Shand said:—

The cheque having been so granted to the extent of £250 gratuitously, and not for any onerous consideration, the defender was, in my opinion, entitled to recal it, or to stop payment of it to that extent so long as it continued in Mr. Cotton's hands, or subject to his control. But, as soon as it was indorsed and delivered by Mr. Cotton to his banker or to any third party for onerous causes, the defender's right to stop payment of it ceased. . . . . It was maintained that as the pursuers made no advance to Cotton on the faith of or in return for the cheque indorsed and delivered to them by him, they were in no better or higher position than Cotton himself, and that the defender was therefore entitled to stop payment of the cheque when he did so, even in a question with them. But an accommodation to Cotton granted to enable him to reduce the balance at his debit with the pursuers, and the defender agreed that the said cheque should be so used by Cotton and the pursuers: Find that in pursuance of the said agreement between Cotton and the defender, Cotton on the receipt of the

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this view is unsound. It was, in my opinion, enough to make the transaction onerous that Cotton was largely indebted to the pursuers; and the pursuers having received the cheque in reduction of the balance due to them, became not gratuitous but onerous holders of it. This is, I think, clearly established by the judgment of the Court in the case of *Misa* v. *Currie* in the Exchequer Chamber (Law Rep. 10 Ex. 153) and House of Lords (1 App. Cas. 554). The Exchequer Chamber there held that a creditor to whom a negotiable security is given on account of a pre-existing debt, holds it by an indefeasible title, whether it be one payable at a future time or on demand, and although the learned judges in the House of Lords found an additional ground of judgment, opinions in accordance with the view of the Exchequer were expressed. The same argument was expressed in another form when it was maintained for the defender on the authority of the case of *Clydesdale Bank* v. *Royal Bank* (3 Court Sess. Cas. 4th Series, p. 586), that the pursuers, in presenting the defender's cheque to his bankers for payment, were merely Cotton's agents, and that as payment of the cheque might be stopped as against Cotton, so payment might also be stopped as against his agents, the pursuers. I have already stated the answer to this argument, which appears to me to be conclusive. The pursuers became themselves onerous holders of the cheque when they accepted it to be placed to the credit of their debtor's account and credited it accordingly. Had the balance on Cotton's account-current been in his favour, or had his account been squared when he delivered the indorsed cheque to the pursuers through their agent, then I think the pursuers would have been his agents only for the collection of the amount of the cheque, and in that case, I do not doubt that the defender, having the right to stop payment of the cheque as against Cotton, would also have had the same right as against the pursuers, as Cotton's agents. But if the pursuers had advanced money on or in return for the cheque, and so acquired it for value, they could no longer in my opinion be regarded as agents only for Cotton. They would in that case have become themselves onerous holders or purchasers of the cheque and so also in the actual case, as disclosed in the proof, the pursuers were not agents for Cotton, but onerous holders for themselves, having received the cheque in reduction of Cotton's debt to them, and I shall only add on this point, that if it can be represented successfully that the case of *Clydesdale Bank* v. *Royal Bank* conflicts with this view, I am humbly of opinion that its authority may be regarded as questionable, particularly with reference to the grounds of decision both in the Exchequer Chamber and the House of Lords, in the case of *Currie* v. *Misa* (Law Rep. 10 Ex. p. 153; 1 App. Cas. p. 554), which does not appear to have been cited in the argument, and was decided on appeal in the House of Lords some months after the case of the *Clydesdale Bank* had been disposed of in this Court.

I need scarcely say that I agree in thinking there is no evidence to

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defender's cheque, indorsed it to the pursuers and gave it to them as cash, and the contents being put to his credit, the balance at his debit was thereby reduced to £28 15*s.* 5*d.* sterling: Find that on Monday forenoon the pursuers passed the cheque through the clearing house, that is to say, one of their clerks, in conjunction with a clerk of the Bank of Scotland, ascertained the difference in amount between the value of the cheques payable between the two banks, and placed the difference to the credit of the bank having the preponderance in value: Find that on Monday afternoon the defender directed the Bank of Scotland not to honour the cheque, and that in consequence the pursuers were not credited by that bank with the amount contained in it: Find that the pursuers have thus suffered loss to the amount of the value of the cheque by the act of the defender in stopping payment of it: Refuse the appeal, and allow the decree pronounced by the sheriff-substitute in favour of the pursuers on the 14th of July, 1882, to go out, and be extracted in name of "The Clydesdale Bank," and decern: Find the appellant liable in expenses.

1883. Nov. 23, 26, 27. *Sir F. Herschell, S.G.*, and *J. Campbell Smith*, maintained for the appellant that the material question was whether the respondents were holders for value. The amount overdrawn did not form a good consideration. [Earl of Selborne, L.C.:—If you paid a cheque to a tradesman for his account are you justified in stopping the cheque at your bank and demanding it back from the tradesman?] The appellant had a perfect right to do so. No doubt, if good law, *Ex parte Richdale* (1) was an à fortiori case against the appellant. The strongest case in his favour was *De la Chaumette* v. *Bank of England* (2). There, a Bank of England note which had been stolen was remitted by a foreign merchant to his correspondent in this country to whom he was indebted in a sum exceeding the amount of the note. The bank refused to cash the note or

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support the defender's averment of an undertaking by the pursuers through their agent to honour Cotton's draft on the 16th to the extent of his payments on the 14th of January, or of any fraudulent representation on that subject. I feel bound to say, however, that even if the agent Laird had given any such undertaking, or made any such representation, it would not, in my opinion, have availed the defender to the effect of enabling him to escape liability for the present claim, or affected the bank, for on the defender's own account of the matter he became a party to a scheme for deceiving the officials at the head office of the bank as to the state of Cotton's account; and in such circumstances the bank would not be bound by their agent's undertaking or representation.

Lord Deas and Lord Mure concurred with the Lord President.

(1) 19 Ch. D. 409.
(2) 9 B. & C. 208.

even return it. At the time the correspondent was informed of this, he had not made the foreign merchant any advance on the credit of the note. It was held that it was incumbent upon the plaintiff (the correspondent) to shew that the foreign merchant had given full value for it. Lord Tenterden said (1): "We think the plaintiff stands in the same situation as Odier & Co. (the foreign merchants), who sent the note to him. They were mutual agents for each other. De la Chaumette was the agent in England of Odier & Co., and they were the agents in France of the plaintiff. It appears when the note was remitted to the plaintiff the balance as between him and Odier & Co. was £1700 in favour of the plaintiff. But he did not, in consequence of having received the note make any further advance or give any further credit to Odier & Co. than he would have done if the note had not been transmitted. Unless, therefore, we were to lay down a rule that a party who holds a note, however obtained, may, by merely remitting it to a person to whom he is indebted enable him to sue, we must say that the plaintiff must be considered as representing Odier & Co.; and that if he can recover at all, it must be upon their right."

Though the Exchequer Chamber in *Currie and Others* v. *Misa* (2) were of opinion the bank must be considered holders for value; in this House (3) that case was decided on another ground, namely, that Misa had received valuable consideration for the cheque: and therefore the later judgment could not be said to affirm the earlier opinions. The transaction here took place before the Bills of Exchange Act of 1882. The Court below have found that it was an accommodation transaction. By the law of Scotland a cheque is not so much negotiable as a bill of exchange. Lord Neaves in *Waterston* v. *City of Glasgow Bank* (4), said, "In the case of a bill, value is not only presumed as between the drawer and holder, but it is held to be proved until disproved by writ or oath of the holder. In the case of a cheque there is no such presumption. When a cheque is presented to a bank there is no presumption of onerosity as between the drawer and the

(1) 9 B. & C. at p. 216.

(2) Law Rep. 10 Ex. 153.

(3) 1 App. Cas. 554.

(4) 1874. 1 Court Sess. Cas. 4th Series, 470, at p. 481.

holder." Lord Benholme said he could not entertain the view that a bank cheque stands in the same position as an inland bill (1): and the Lord Justice Clerk (2) observed a cheque "does not presume value in the hands of the bearer. It does not bear on the face of it that any onerous consideration was given for it by the bearer. This must be proved." Here Cotton could not give the holder of the cheque a better right than he had himself. The indorsation of a bill caused onerosity, but it was different in the case of a cheque. A cheque of itself is not evidence of consideration: *Shearer* v. *Alexander* (3); *Hopkinson* v. *Forster* (4); *Shroeder* v. *Central Bank of London* (5); *Barston* v. *Inglis* (6); see also *Bryce* v. *Young's Ex.* (7) These cases shewed that the character of a negotiable instrument had never been given to cheques. In the *Clydesdale Bank* v. *Royal Bank* (8), a cross cheque purporting to be drawn by Dixon Brothers on the Clydesdale Bank in favour of Daniel Paul, or bearer, was presented to the Royal Bank, of which Paul was a customer, and paid. The cheque was presented for payment to the Clydesdale Bank and its amount paid to the Royal Bank. Subsequently it was discovered that the signatures of the drawer and indorser were forged. It was held that the Royal Bank had only acted as Paul's agent. They were merely the hands through which the crossed cheque, drawn on the Clydesdale Bank by their customer, found its way to the Clydesdale Bank (9). The majority of the Court below accepted this as the law of Scotland, and that being so, the judgment appealed against must have been for the appellant, but for the so-called founding in fact implying an agreement binding the appellant to pay the amount of the cheque to the respondents, which is not averred nor pleaded, and which is inconsistent with the respondents' case, which is, in substance, that the holder of this cheque was in the same position as if it had been a bill of exchange, or as if the transaction had been subsequent to the

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(1) 1 Court Sess. Cas. 4th Ser. 480.

(2) Ibid. 479.

(3) 1875. 12 Scot. Law Rep. 333.

(4) 1874. Law Rep. 19 Eq. 74.

(5) 34 L. T. (N.S.) 735.

(6) 20 Court Sess. Cas. 2nd Series, at p. 231.

(7) 1866. 4 Court Sess. Cas. 3rd Series, 312, 317, 318.

(8) 1876. 3 Court Sess. Cas. 4th Series, 586.

(9) Lord Ardmillan, 3 Court Sess. Cas. 4th Series, at p. 590.

Bills of Exchange Act of 1882. [LORD WATSON mentioned *McGilchrist* v. *Arthur* (1), and *Macdonald* v. *Union Bank* (2). The whole of the judges in the latter case held that a cheque was a bill of exchange with certain exceptions.] These cases are cited for the first time, and the authority of the *Royal Bank Case* is later than these. [EARL OF SELBORNE, L.C.:—Cheques are bills of exchange though they do not include certain privileges.] They may be in one sense, but they are not negotiable except for value: see also Lord Kenyon in *Solomons* v. *Bank of England* (3). If Cotton had received the £250, then there would have been no question. [EARL OF SELBORNE, L.C.:—If he gets money's worth, is that not enough? Of course it would have been a different thing if you could have proved that the bank was only his agent, and received it as such.] They submitted the transaction did not alter the position of the Clydesdale Bank. The Bank advanced no money on this cheque. They suffered no loss, they neither made any advance nor gave any fresh credit to Cotton in virtue of the cheque. In fact and truth they held it merely as Cotton's agent authorized to collect money for him, and apply it only after they had actually received it. Cotton himself had no power to enforce payment, and the respondents had no better right.

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(1) 1794. Mor. 877. James Fife granted to Macausland the following order: "February 23, 1793. Pay the bearer on demand, or his order, one hundred pounds sterling, and debit my account with the branch of the Bank of Scotland, Greenock: To Messrs. Wilson and Arthur their agents." This order, Fife afterwards alleged, was granted without value, and on promise of repayment on or before the 26th of February, 1793. Macausland stopped payment on the 5th of March following. On the 12th of that month, Fife received a charge of horning upon this draft, at the instance of John McGilchrist, who had got it as a payment from Macausland on the 24th of February, but had not presented it at the bank till the 5th of March, when Fife having by that time withdrawn his money out of their hands, payment was refused, and a process immediately taken. Fife raised a suspension of this charge, which, upon his bankruptcy, was conducted by Thomas Arthur, the trustee for his creditors. The summary charge was turned into a libel; and the Lord Ordinary found the defender liable in the sum contained in the draft. Arthur reclaimed and pleaded, inter alia, that drafts like the present had not the same privilege of negotiation with bills or promissory notes. When transferred to a third party, all objections competent against the cedent may also be proponed against the assignee.

[Observed on the Bench: The draft in question is transferable like a bill of exchange. It is equally free from compensation with a bank note. It falls under the class of "notes of trading companies," which are exempt from the enactments of the Act of 1696, c. 25. Besides, the drawer having issued his order in these terms, is barred, personali exceptione, from objecting to the negotiability of it, and the trustee for his creditors cannot be in a better situation.] The Lords unanimously "refused the petition" without answers.

(2) 1864. 2 Court Sess. Cas. 3rd Series, 963, at pp. 974, 976, 977.

(3) 1791. 13 East, 135, n.

Also the interlocutor of the 2nd of March, 1883, was erroneous, because it was not in accordance with the 40th section of the Act of 1825 (6 Geo. 4, c. 120) or with the dictum of Lord Blackburn in *Mackay* v. *Dick* (1). Certain of the facts specified in that interlocutor were not competently found, for no such facts as—That the cheque was granted to Cotton to reduce the balance at his debit with the respondents, &c., and that in pursuance of that agreement the cheque was indorsed to the respondents and given to them as cash,—are averred in the record. Nor was the appellant in the record called upon to meet any such case. The interlocutor was also in fault as not finding the whole facts, for instance, the question of bona fides on the part of the bank should have been set out. Nor did it negative the appellant's defence, or warrant any finding in law adverse to him. [Cited also *Williamson* v. *Allan* (2); Bell Com. vol. 2, p. 202, et seq.; *Butcher* v. *Stead* (3), *McKenzie* v. *British Linen Co.* (4); Thomson on Bills of Exchange (2nd ed.) pp. 191, 192, 257.]

Davey, Q.C., and *Geo. Readman*, appeared for the respondents but were not called upon.

The following judgment was delivered—

Lord Blackburn (5):—

There is no doubt, I think, that the decision appealed against is perfectly right. The first question (and it would be one of considerable importance if there were any doubt about it) is whether a cheque drawn as this is, is a negotiable instrument or not; and upon that point I should have myself thought beforehand that there could not be any possible question raised. The general law-merchant for many years has in all countries caused bills of exchange to be negotiable. That is a common ground which belongs to all, or almost all, countries, and it has been adopted as the law in all civilized countries. There are in some cases differences and peculiarities which by the municipal law of each country are grafted upon it, and which do not affect other countries; but the general rules of the law-merchant are the same in all countries, and before the recent Act (the Bills of Exchange Act) which received the royal assent in August, 1882, the general law of Scotland and the general law of England were the same. Some peculiarities there were in the municipal law of Scotland as to the mode in which it was to be enforced; and there may have been some things (though we have not been able to discover them) which according to the law of England might be enforced, which could not have been enforced in Scotland. We need not, however, decide that matter. Upon the general question of negotiability the law has always been the same in both countries, and we have always been in the habit of treating the authorities of each country as authorities in the other. We constantly in the English Courts, upon the question what is the general law, cite Pothier, and we cite Scotch cases where they happen to be in point; and so in a Scotch case you would cite English decisions, and cite Pothier, or any foreign jurists, provided they bore upon the point (1).

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(1) 6 App. Cas. at p. 262.

(2) 1882. 9 Court Sess. Cas. 4th Series, 859.

(3) Law Rep. 7 H. L. 839.

(4) 6 App. Cas. 82.

(5) The Lord Chancellor was suffering from hoarseness, and asked Lord Blackburn to give the leading opinion.

That being so, let us now see what is the question which is here raised. There is a cheque drawn upon a banker, and that cheque is upon the face of it payable to order. It is said very confidently by Mr. Campbell Smith, that such a cheque drawn upon a banker is not, by the law of Scotland, negotiable. Why that is said we will see in a moment. I do not think that the Bills of Exchange Act applies to this case, for it did not receive the royal assent

(1) See Œuvres de Pothier, 1827, vol. iii., Du contrat de change, pp. 123, 222.

until some months after the cheque had been issued; but I do think that the enactments in that Act are very good evidence of what had been the general understanding before it was passed, and of what was the law upon the subject. Now the definition which in that Act is given of a bill of exchange (sect. 3), is one which I think will be found in most treatises as the definition of a bill of exchange, and has always been considered the right one. "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer." That definition completely embraces in it a cheque. A cheque is such an order: an unconditional order in writing addressed to a banker requiring him to pay a sum certain in money at a fixed or determinable future time, that is to say, on presentation; and coming within that definition it would clearly be a bill of exchange. Why should a cheque not be a bill of exchange? No reason whatever, that I am aware of, can be assigned for its not being so. The fact is that for the purpose of fiscal regulations,—on grounds which were supposed to be satisfactory to the legislature,—it was enacted that cheques on bankers, or on persons acting as bankers, should not be liable to stamp duty. But there were qualifications put upon that; they were not to be liable to stamp duty provided they were only payable to bearer, and provided they were issued within fifteen miles of the place of business of the banker. These qualifications have long ceased, but while they existed cheques upon bankers were very much confined in their negotiability and use, because the heavy penalties which would have been incurred if those limits had been transgressed, prevented their being transgressed—openly at least. I believe as a matter of fact cheques were drawn for enormous sums more than fifteen miles distant from the place of business of the banker, the parties resolutely shutting their eyes to the facts of the case, and running the risk of the penalty. All that, however, is now done away with.

Now why should a cheque drawn on a banker for that reason be in any different position, as far as negotiability goes, from a cheque or bill drawn upon anybody else? There is no apparent reason for it whatever. There is one difference at least, and there may be more, between a cheque and a bill of exchange. A bill of exchange would, unless something appeared to shew that it was not to be so, have the days of grace, while a cheque has no days of grace; there is that difference, but it makes no further difference that I am aware of. Looking at the thing according to reason and sense it would appear that a bill of exchange or a cheque drawn upon a banker should be in all respects equally negotiable as if it were not drawn upon a banker, but were drawn upon some one else. Accordingly it has repeatedly been so held in England, and I do not think that is disputed. The case in which that was positively decided in England was the case of *Keene* v. *Beard* (1). The question there was very much indeed like that which was afterwards decided by the Court in Scotland in the case which has been referred to of *Macdonald* v. *Union Bank* (2). The question there was whether, when a cheque had been drawn upon a banker payable to bearer, and the person who received it had afterwards written his name upon it as the indorser of it, and had passed it away in that manner, the person who had thus indorsed it to another was liable to that other as indorser. It was decided that he was. That decision proceeded upon the ground that a cheque was in no respect different from an inland bill of exchange. So those who drew the Bills of Exchange Act thought; for in Part III. they begin with this definition of a cheque: "A cheque is a bill of exchange drawn on a banker payable on demand"; and then they proceed to declare and enact that a cheque in future at all events is to be like a bill of exchange in all respects. Why should not that have been the law before? Mr. Campbell Smith says that it is not the law in Scotland. Now, for all I know to the contrary, there may be some respects in which in the law of Scotland a bill of exchange and a cheque are not the

(1) 8 C. B. (N.S.) 372; see also *Hopkinson* v. *Forster*, Law Rep. 19 Eq. 74.

(2) 1864. 2 Court Sess. Cas. 3rd Ser. 963.

same. I have already pointed out one difference, namely, that there are days of grace in the case of a bill of exchange which there are not in the case of a cheque. That is not material to the present case. But besides that it may be that there are other differences in the law of Scotland, as to summary diligence, and modes of enforcing it, and privileges of that sort. It may be (I do not know anything about it) that those remedies are by the law of Scotland not applicable to cheques, but are applicable to bills of exchange; and some of the passages which Mr. Campbell Smith has quoted from Lord Neaves and has relied upon look very much as if he had thought so. But when you come to see whether a cheque is not a negotiable instrument as well as a bill of exchange, the authorities in Scotland seem to be uniformly to the effect that it is negotiable, and that it is to be recovered upon under exactly the same circumstances as any other negotiable instrument would be. I myself think, especially now when the fiscal laws are taken away, and when we all know in point of fact that a large number of cheques are drawn for entirely the same purpose as bills of exchange (for example, a gentleman resident in London draws a cheque upon a Scotch banker and transmits it to a tradesman, or some other person, to whom he has to pay money, in order to accomplish the proper object of a bill of exchange, namely to transfer money from one country to another, or from one person to another) it would be extremely injurious to commerce if there were any doubt at all upon the point that a cheque is a negotiable instrument like other bills of exchange.

Now on this point the authorities seem to be uniform. There may be that distinction which Lord Neaves put, that some of the summary remedies which are applicable to the one instrument are not applicable to the other; but otherwise the authorities are uniform to the effect that a cheque given in this way is a negotiable instrument in Scotch law, and consequently that the holder of it to whom the property in it has been transferred for value either by delivery or by indorsement, is entitled to sue upon it, if upon due presentation it is not paid.

There was also some confusion in the argument in this respect;

it was put as if it made some difference that this cheque could not be paid because M'Lean, the drawer of the cheque, had ordered the bank not to pay it. His liability was because, he having drawn the cheque upon the bank, the bank did not pay it on presentation. If the bank had not paid it because they had no funds in their hands, or if the bank having funds in their hands, had stopped payment and had become insolvent, the liability of M'Lean would have been the same. It was not because he countermanded the cheque and forbad the bank to pay it upon presentation, but because they did not pay it upon presentation, that the cause of action arose.

That being so, it only remains to see (the cheque being handed in this way to the bank, as the interlocutors find, and the bank taking it as having been properly transferred to them) whether that was merely a handing of it in the same way as a merchant would hand a cheque to his clerk to carry that cheque to the bank in order to get the money for it, or as he would hand a draft to his clerk to carry that draft in order that he might get it accepted, and the like. In such a case of course the servant or agent to whom he gives it has no property in it; it was not intended that he should have any, and he has none. Now in the present case did the bank get the cheque in that way as a mere agent, and nothing else, or did they get it in order that they might have the property in it transferred to them and that they might become holders of it? The condescendence makes this averment: "The said draft or cheque was indorsed by the said W. B. Cotton, and was by him delivered to the pursuers on or about the 14th day of January, 1882, on their paying to him the said sum of £265 2*s.* 6*d.*, or placing the same to the credit of his account which was then overdrawn to an amount in excess of the said sum, and thereby extinguishing the said account to that extent." That is the averment. The conclusion of law is, "The pursuers are thus onerous holders of the said draft or cheque for full value." The conclusion of law is drawn from the fact. Is the fact true? In this particular case we have not to look at the evidence to see how it was, but we have to see whether or no it is found to be so. No evidence outside the interlocutor is admissible, and I can read the interlocutor in no other way than that it is found to be so. The Court of Session have no doubt inquired and found the fact that M'Lean had given the cheque to Cotton expressly in order that Cotton might use it in this way by handing it to the bank, and consequently there was no breach of faith in Cotton handing it to the bank. They have found that. That is evidence going to shew that it came to the bank without any mala fides.

Something was said in the argument about the rule of law, which is quite clear, and which has been long established, in England at least, that though primâ facie you presume value in the person who holds, yet if you shew that the instrument was obtained from the person who formerly held it by fraud, it raises a presumption that he would pass it away to somebody in order that it might be sued upon, and that that person would not really be a holder for value; consequently when that is shewn, the onus is shifted, and the person who holds the bill of exchange is put upon proof, and can no longer rely upon the mere presumption in law of its being a negotiable instrument. If such a question had arisen here and proof had been given, I think that the fact that the cheque was given by M'Lean to Cotton for this very purpose would have prevented the burden of proof being shifted. But that is not material for decision here. What the Court below has found (and we are bound to take it as truly found) is, "that Cotton on the receipt of the defender's cheque indorsed it to the pursuers and gave it to them as cash; and the contents being put to his credit the balance at his debit was thereby reduced to £28 15*s.* 5*d.*" Now how can it be said gravely that that is not a distinct and intelligible finding that the cheque was paid to the bank as cash with the intent that they might be the owners of it, and that Cotton's debt to them should be reduced by that amount?

The case was then attempted to be argued in this way, that that being so, nevertheless though the bank were holders of the cheque they could not sue upon it. Something was said about the case of *Currie* v. *Misa* (1). It does not seem to me that the question which arose in that case is really necessary to be decided here. In the present case we have it found distinctly that the bank were paid this cheque for the very object of its being received by them, precisely as if it had been a £250 Bank of England note, which had been handed in by Cotton for the purpose of reducing his debt. If so, no such question as that which was raised in the case of *Currie* v. *Misa* (1) would arise here. But I must own that I have never been able to perceive any ground for doubting that the Court of Exchequer Chamber were perfectly right in the case of *Currie* v. *Misa* (1) when they held that the payment of a cheque, or a bill payable on demand, on account of a debt to a banker, a payment by which it was intended to be handed to them as property, and not merely handed to them as a servant or agent, but handed to them as cash with the object of reducing a balance, was a payment for perfectly good and valuable consideration; but I do not know that it is necessary to decide that point here, because it is not raised.

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(1) 1876. Law Rep. 10 Ex. 153; 1 App. Cas. 554.

Now the other points which have been endeavoured to be raised are very special demurrers, as I may call them, upon the form of the interlocutor and so on. It seems to me, as I have already said, that the point which is raised by the pleadings is this, Was this a negotiable bill? As I have already said, I can see no reason why a cheque should not be a negotiable bill both by the law of England and by the law of Scotland. This then is a negotiable bill. If so, did the bank have it indorsed to them for value, so that they became, as is averred in the third condescendence which I have read, "onerous holders of the said draft or cheque"? If so, when it was presented and dishonoured, was there a recourse against the drawer, who had handed it to them, to sue for that dishonour, no matter whether it was because M'Lean ordered the bank to do it, or whether it was done for any other reason? I see no possible reason for saying that they would not be able to recover upon that ground; I think that that is the very ground upon which it goes. All the rest, whether there was fraud, whether there was mala fides, and the like, are matters which if there had been any ground for them, ought to have been raised by the defender, and no one of them having been found, we must take the case accordingly. Looking at it as we are obliged to do, and taking the facts upon the finding of the Court, and treating it as a special verdict, I think that upon matters of law the decision is right, and I accordingly move your Lordships that this interlocutor be affirmed, and that the appeal be dismissed with costs.

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(1) 1876. Law Rep. 10 Ex. 153; 1 App. Cas. 554.

Lord Watson:—

Notwithstanding the able and very long argument which has been addressed to the House by the learned counsel, this is a very plain case according to the law of Scotland; and in order to give a colour to the contention of the appellant it was necessary for his counsel either to ignore or to impeach principles long since established by decision. I agree with the observations which have been made by my noble and learned friend as to the scope and import of the findings of fact contained in the interlocutor of the Court of Session. They are undoubtedly within the record, and I apprehend that your Lordships in deciding as between the parties, must take into account all the findings of fact pronounced by the judges, whether they are derived from the pursuers' or from the defender's statements. It may be true that a pursuer cannot be allowed, in consequence of some finding of a fact which is only to be found in the interlocutor, to alter the foundation of his action. But in this case there is no pretence for saying that the respondents desire to alter the foundation of their action, which throughout is based upon this, that it was a legal wrong upon the part of the appellant to direct his bankers to refuse payment of a cheque which he was in law bound to make good to the pursuers.

I think that three at least of the judges of the First Division, namely, the Lord President and Lords Deas and Mure, have based their judgments upon this special circumstance, that the appellant, in giving his cheque for the accommodation of Cotton, did so in the knowledge that it was to be handed to the bank in payment of an over-draft then due to them by Cotton; that he gave it to Cotton to be used for that special purpose, and for no other. I agree with the view which their Lordships took of the case upon that state of facts. I think that in law the position of the appellant is the same as if he had gone to the bank, and had there undertaken to pay, and had professedly paid, the over-draft with his cheque, handing it across the counter to the bank.

But apart from these specialties I entirely agree with the statement of the Scotch law which has been made by my noble and learned friend. I have no doubt that, according to the law of Scotland, a cheque in the form of that which was given by the appellant to Cotton is a negotiable instrument, in other words is substantially a bill, attended with many, though not all, of the privileges of a bill. The law upon this point appears to me to be stated with great accuracy by the late Lord Cowan in the case of *Macdonald* v. *Union Bank* (1). His Lordship there said, "A banker's draft or cheque according to all the authorities, and according to the practice of bankers, is a negotiable instrument; and such documents are as negotiable as bills of exchange or promissory notes." And the law does not rest upon that judgment alone. I find that in the case of *McGilchrist* v. *Arthur* (2) decided by the Court of Session in the year 1794, precisely the same doctrine was laid down as to the negotiable character of a banker's draft, or cheque. Not only so, but I find that all the text-writers of this century who treat of bankers' cheques, lay down the law in precisely the same terms. So that it is out of the question to say (as the appellant's counsel ventured to suggest) that this is recondite law which requires to be dug out for the purposes of this particular case. It has been a well-known and settled rule of the law of Scotland for at least a century past.

One other question remains which has been argued on the part of the appellant; he says, "Esto that this draft was a negotiable instrument, the respondents gave no value for it, and therefore they are liable" (to use the language of the law of Scotland) "to all the exceptions pleadable against the original holder of the cheque;" in other words against Mr. Cotton, to whom the appellant gave it undoubtedly for his accommodation only. That would be a strange doctrine to affirm even if the point had occurred for the first time; and no authority whatever has been adduced to support it. The learned counsel who opened the case, rested his argument upon *De la Chaumette* v. *Bank of England* (1). But it is impossible to accept that decision as an authority according to the interpretation which the appellant's counsel put upon it. I prefer the explanation of the ground of judgment given by the late Lord Hatherley in the case of *Misa* v. *Currie* (2) in this House. His Lordship said (3), "It appeared, from the circumstances of that case, that the party suing was suing simply as an agent of a person who was bound to shew that he had given good and valuable consideration." If that be taken to be (what, in my opinion, it is) a correct representation of the ground of judgment in *De la Chaumette* v. *Bank of England* (1), how is it possible to regard that case as an authority for the proposition that a third party taking a cheque in payment of an account, and not taking or holding it as agent for the person who gave it him, does not hold it for value? But the rationes upon which, apart from all authority on the point, I should proceed as a matter of principle, are fully expressed in the opinion of the majority of the judges in the Court of Exchequer Chamber in the case of *Misa* v. *Currie* (4). It is true that another ground of judgment was adopted by the House of Lords when that case came before them on appeal; but I cannot find anything in the "observations" made by the noble and learned Lords who decided *Misa* v. *Currie* (2) in this House, calculated to throw the least discredit upon the doctrine laid down by the majority of the Court of Exchequer Chamber, whilst on the contrary I find a great deal which tends to support the view taken by the majority.

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(1) 1864, 2 Court Sess. Cas. 3rd Series, 963.

(2) Mor. 877.

These observations seem to me to be quite sufficient to dispose of the appeal before the House. Lord Shand was of opinion (and I do not at all disagree with him), that the case ought to be decided upon broader grounds than those which were adopted by the majority of his brethren. I think that the grounds of judgment relied upon by Lord Shand and those relied upon by the majority of the Court are equally sound, and equally fatal, of course, to the contentions of the appellant at your Lordships' Bar. I have only to add this remark, that I do not think the principles involved in the decision of this case touch or impair the doctrine laid down by the Court of Session in the *Clydesdale Bank* v. *Royal Bank* (1). The whole question in that case related to the character in which the bank got possession of and held Mr. Paul's cheque. The Court there decided, according to the view which they took of the circumstances of the case, that the bank held simply as agents for Mr. Paul. But what was decided in that case cannot in the least degree affect the present, because the question in what character a bank holds a cheque which has been given to them by their customer is a question of fact. In the present case it is conclusively established by the findings of the Court contained in the interlocutor appealed against, that the Clydesdale Bank held the cheque in question not as agents for Mr. Cotton, but as onerous holders, the cheque having been given to them in payment of what was due to them by Cotton.

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(1) 1829. 9 B. & C. 208.

(2) 1 App. Cas. 554.

(3) Ibid. at p. 570.

(4) June 26, 1876. Law Rep. 10 Ex. 153.

In these circumstances I have no hesitation in concurring in the proposal which has been made by my noble and learned friend, that this appeal be dismissed with costs.

LORD BLACKBURN :—

My Lords, I wish to add one word upon a matter which was not present to my mind before, namely, that the question whether the opinion of Lord Coleridge, who was in the minority in the case of *Currie* v. *Misa* (2), or that of the majority of the Court of Exchequer Chamber is the right one, can never arise at all in future, for the 27th section of the Bills of Exchange Act, says this:

(1) March 11, 1876. 3 Court Sess. Cas. 4th Series, p. 586.

(2) Law Rep. 10 Ex. 153; 1 App. Cas. 554.

H. L. (Sc.)
1883

M'Lean
v.
Clydesdale
Banking
Company.

"Valuable consideration for a bill may be constituted by . . . an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand, or at a future time."

Interlocutor appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 27th Nov. 1883.

Agent for appellant: *A. Beveridge.*
Agent for respondents: *Murray, Hutchins, & Stirling.*

[PRIVY COUNCIL.]

J. C.*
1883
Nov. 14, 15, 16; Dec. 15.

ARCHIBALD G. HODGE . . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO, CANADA.

British North America Act, 1867, *ss.* 91, 92—"*Liquor License Act of* 1877, *c.* 181, *Revised Statutes of Ontario*"—*Powers of Local Legislature—Regulations of Local Board—Imprisonment with Hard Labour.*

Subjects which in one aspect and for one purpose fall within sect. 92 of the British North America Act, 1867, may in another aspect and for another purpose fall within sect. 91.

Russell v. *The Queen* (7 App. Cas. 829) explained and approved.

Held, that "The Liquor License Act of 1877, c. 181, Revised Statutes of Ontario," which in respect of sects. 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., does not in respect of those sections interfere with "the general regulation of trade or commerce," but comes within Nos. 8, 15, and 16, of sect. 92 of the Act of 1867, and is within the powers of the provincial legislature.

Held, further, that the local legislature had power by the said Act of 1867 to entrust to a Board of Commissioners authority to enact regulations of the above character, and thereby to create offences and annex penalties thereto.

"Imprisonment" in No. 15 of sect. 92 of the Act of 1867 means imprisonment with or without hard labour.

APPEAL from a decision of the Court of Appeal (June 30, 1882), allowing the respondent's appeal from a decision of the Court of Queen's Bench (June 25, 1881); by which last-mentioned decision it was ordered that a certain examination made on the 19th day of May, 1881, by and before the police magistrate of the city of Toronto, on the information and complaint of one Thomas Dexter, whereby the appellant was convicted for that he the appellant did on the 7th day of May, 1881, unlawfully permit and suffer a billiard table to be used and a game of billiards to be played thereon, in his tavern in the conviction named and described as the St. James' Hotel, situate within the city of Toronto, during the time prohibited by the "Liquor License Act," (Revised Statutes of Ontario, c. 181) for the sale of liquor therein, against the form of the resolution of the License Commissioners for the city of Toronto for regulating taverns and shops, passed on the 25th of April, 1881, should be and the same was quashed.

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* *Present:*—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

The appellant at the time of the alleged offence was the holder of a liquor license, issued on the 25th of April, 1881, by the Board of License Commissioners for the city of Toronto, under "the Liquor License Act" of the Province of Ontario, in respect of the St. James' Hotel, which license remained in force until the 1st of May, 1882.

The appellant was also then the holder of a license dated the 24th of February, 1881, issued under the authority of the "Municipal Act" (Revised Statutes of Ontario, c. 174, sec. 461), by the corporation of the city of Toronto, authorizing him to carry on the business or calling of a keeper of a billiard saloon with one table for hire, which last-mentioned license remained in force until the 31st of December, 1881.

The facts are stated in the judgment of their Lordships.

Kerr, Q.C. (of the Canadian Bar), and *Jeune*, for the appellant:—

First, the Ontario Assembly is not competent to legislate in regard to licenses for the sale of liquor, and the regulation of licensed houses. The British North America Act, sect. 92, sub-sect. 9, empowers the Provinces to legislate in regard to shop and tavern licenses, but only for the purpose of raising a revenue. Sect. 91, sub-sect. 2, gives the regulation of trade and commerce to the Dominion. In the case of *Russell* v. *The Queen* (1) it was held that the power to prohibit and regulate the traffic belonged to the Dominion. It is very desirable that legislation on this subject should be uniform; and this cannot be secured if each province can pass a licensing law of its own. Second, even if the Ontario Legislature could deal with the subject it could not delegate its powers to License Commissioners. In *The Queen* v. *Burah* (2) it is laid down that a local legislature cannot create a

(1) 7 App. Cas. 829.

(2) 3 App. Cas. 905.

new legislative power not created or authorized by the Imperial Parliament. In this case the local legislature has assigned to three officials the power to define offences and impose penalties. But even if the statutory powers of the Commissioners are intra vires of the legislature, this resolution is not a good exercise of their powers. They assume to regulate billiard tables, which ought to be regulated by the City Council in accordance with Rev. Stat. Ont. c. 174. The resolution is also bad because it places keepers of billiard tables who sell liquor at a disadvantage as compared with those who do not. A by-law discriminating in favour of one class of traders and against another is bad: see *Jonas* v. *Gilbert* (1). See also Cooley on Constitutional Limitations, pp. 201, 503.

[LORD FITZGERALD:—We will take the passages from Cooley as part of your argument but not as authority.]

Lastly, there is no power in the legislature or in the Commissioners to impose the punishment of hard labour. There is a wide difference between simple imprisonment and hard labour: Hawkins' Pleas of the Crown p. 184; *Easton's Case* (2). The British North America Act, sect. 92, sub-sect. 15, prescribes "fine, penalty or imprisonment," as the punishments to be imposed for breach of provincial laws. The decision in *Frawley's Case* (3) was based on the mistaken assumption that the Provinces surrendered their right into the hands of Parliament at confederation. There was a re-arrangement and transfer of some provincial powers to the Dominion, among others of the power to deal with criminal law, along with which the power to impose hard labour naturally goes. The penalty imposed by the resolution is a fixed penalty, and therefore unreasonable: *Saunders* v. *South Eastern Railway Company* (4).

Davey, Q.C., and *Æmilius Irving*, Q.C. (of the Canadian Bar), (*Raleigh* with them), for the Crown:—

This question must be decided by the rules laid down in *Citizens' Insurance Company of Canada* v. *Parsons* (5). Does the

(1) 5 Sup. Ct. Can. 356.
(2) 12 Ad. & E. 645.
(3) 46 U. C. Q. B. 153; 7 App. Rep. 246.
(4) 5 Q. B. D. 462.
(5) 7 App. Cas. 96.

Liquor License Act belong to any of the classes of subjects assigned to the Provinces? The liquor trade, like all other trades, is subject to local regulation for purposes of police. The Commissioners are a "municipal institution" within sub-sect. 8 of sect. 92 of the British North America Act. The regulation of licensed houses is primarily a matter of police; the interference with "trade and commerce" is only incidental. *Russell* v. *The Queen* (1) establishes the right of the Dominion to legislate on the liquor traffic as a matter affecting the peace and good government of Canada. This is not inconsistent with the right of the Provinces to legislate on the same subject for purposes of police. This is recognised in sect. 112 of the Canada Temperance Act itself. Of course if the Province restricts any trade by requiring a license, that must be done bonâ fide for the purpose of raising a revenue. The right to regulate licensed houses is generally recognised in Canada, as appears from the cases collected in Cartwright's Cases on the B. N. A. Act: see *City of Fredericton* v. *The Queen* (2); *In re Slavin and the Corporation of Orillia* (3); *Reg.* v. *Justices of King's County* (4); *Keefe* v. *Maclennan* (5); *Blouin* v. *Corporation of Quebec* (6); *Corporation of Three Rivers* v. *Sulte* (7).

As to the delegation to Commissioners, the maxim Delegatus non potest delegare does not apply to a local legislature: *Reg.* v. *Burah* (8). There is here no delegation of legislative authority—only of the power to make by-laws. The resolution is within the powers of the Commissioners. They do not attempt to regulate billiard tables; it is as liquor licensee not as billiard licensee that the appellant is required to close his billiard saloon. As to the penalties which may be imposed, sect. 59 of the Liquor License Act prescribes fine and imprisonment; sect. 70 adds the powers for enforcing by-laws given to municipal councils by sects. 400–407, and sect. 454 of the Municipal Act, Rev. Stat. Ont. c. 174, and these powers include the imposition of hard labour. By Con. Stat. Can. 1859, c. 99, hard labour could be added to any sentence of imprisonment. That Act is still in force as to offences against provincial laws; as to offences against the criminal law (which is assigned to the Dominion) it has been re-enacted. The term "imprisonment" is very general, and includes imprisonment with hard labour: see Stephen, Digest of Criminal Law, art. 4, which gives the effect of 28 & 29 Vict. c. 126. In construing a conviction, the term "imprisonment" would not be assumed as against the prisoner to mean imprisonment with hard labour. But in construing an instrument of government, such as the B. N. A. Act, a wide construction should be given to the powers of the local legislature: see Vattel, ii., 17, sects. 285–286, cited in the judgment appealed from. The resolution is not open to objection as prescribing a fixed penalty, for by sect. 402 of the Municipal Act (incorporated in the Liquor License Act) the justice may commit "for the term or some part thereof specified in the by-law," They also referred to *Reg.* v. *O'Rourke* (1), and Archbold's Criminal Pleading, 19th ed., p. 56.

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(1) 7 App. Cas. 829.
(2) 3 Sup. Ct. Can. 505.
(3) 36 U. C. Q. B. 159.
(4) 2 Pugsley, 535.
(5) 2 Russell & Chesley, 5.
(6) 7 Quebec L. R. 18.
(7) 5 Legal News, 330.
(8) 3 App. Cas. 904.

Kerr, Q.C., in reply:—

The Provinces have a strictly limited jurisdiction, and though they may amend their constitutions, they may not take more power than Parliament gave them. "Municipal institutions" includes only what was generally included under that head at confederation. In some of the Provinces the legislature had never undertaken to restrict the liquor trade. He referred to *Dobie* v. *Temporalities Board* (2).

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The appellant, Archibald Hodge, the proprietor of a tavern known as the St. James' Hotel, in the city of Toronto, who, on the 7th of May, 1881, was the holder of a license for the retail of spirituous liquors in his tavern, and also licensed to keep a billiard saloon, was summoned before the police magistrate of Toronto for a breach of the resolutions of the License Commissioners of Toronto, and was convicted on evidence sufficient to sustain the conviction if the magistrate had authority in law to make it.

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(1) 1 Ont. Rep. 464; 2 Cart. 644.

(2) 7 App. Cas. 136.

The conviction is as follows, viz.:—

"CONVICTION.

"Canada: Province of Ontario, county of York, city of Toronto, to wit:—

"Be it remembered, that on the 19th day of May, in the year of our Lord one thousand eight hundred and eighty-one, at the city of Toronto, in the county of York, Archibald G. Hodge, of the said city, is convicted before me, George Taylor Denison, Esquire, police magistrate in and for the said city of Toronto, for that he, the said Archibald G. Hodge, being a person who, after the passing of the resolution hereinafter mentioned, received, and who, at the time of the committing of the offence hereinafter mentioned, held a license under the Liquor License Act, for and in respect of the tavern known as the St. James' Hotel, situate on York Street, within the city of Toronto, on the seventh day of May in the year aforesaid, at the said city of Toronto, did unlawfully permit, allow, and suffer a billiard table to be used, and a game of billiards to be played thereon in the said tavern, during the time prohibited by the Liquor License Act for the sale of liquor therein, to wit, after the hour of seven o'clock at night on the seventh day of May, being Saturday, against the form of the resolution of the License Commissioners for the city of Toronto for regulating taverns and shops, passed on the twenty-fifth day of April, in the year aforesaid, in such case made and provided.

"Thomas Dexter, of said city, license inspector of the city of Toronto, being the complainant.

"And I adjudge the said Archibald G. Hodge, for his said offence, to forfeit and pay the sum of twenty dollars, to be paid and applied according to law; and also to pay to the said Thomas Dexter the sum of two dollars and eighty-five cents for his costs in this behalf; and if the said several sums be not paid forthwith, then I order that the same be levied by distress and sale of goods and chattels of the said Archibald G. Hodge; and in default of sufficient distress, I adjudge the said Archibald G.

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Hodge to be imprisoned in the common gaol of the said city of Toronto and county of York, at Toronto, in the county of York, and there be kept at hard labour for the space of fifteen days, unless the said sums, and the costs and charges of conveying the said Archibald G. Hodge to the said gaol, shall be sooner paid."

On the 27th of May, 1881, a rule nisi was obtained to remove that conviction into the Court of Queen's Bench for Ontario, in order that it should be quashed as illegal, on the grounds, 1st, that the said resolution of the said License Commissioners is illegal and unauthorized; 2nd, that the said License Commissioners had no authority to pass the resolution prohibiting the game of billiards as in the said resolution, nor had they power to authorize the imposition of a fine, or, in default of payment thereof, imprisonment for a violation of the said resolution; 3rd, the Liquor License Act, under which the said Commissioners have assumed to pass the said resolution, is beyond the authority of the legislature of Ontario, and does not authorize the said resolution.

It will be observed that the question whether the local legislature could confer the authority on the License Commissioners to make the resolution in question is not directly raised by the rule nisi. On the 27th of June, 1881, that rule was made absolute, and an order pronounced by the Court of Queen's Bench to quash the conviction. The judgment of the Court, which seems to have been unanimous, was delivered by Hagarty, C.J., with elaborate reasons, but finally it will be found that the decision of the Court rests on one ground alone, and does not profess to decide the question which on this appeal was principally discussed before their Lordships. The Chief Justice, in the course of his judgment, says:—

"It was stated to us that the parties desired to present directly to the Court the very important question whether the local legislature, assuming that it had the power themselves to make these regulations and create these offences, and annex penalties for their infraction, could delegate such powers to a board of commissioners or any other authority outside their own legislative body."

And, again, he adds:—

"We are thus brought in face of a very serious question, viz., the power of the Ontario legislature to vest in the License Board the power of creating new offences and annexing penalties for their commission."

And concludes his judgment thus, referring to the resolutions:—

"The legislature has not enacted any of these, but has merely authorized each board in its discretion to make them.

"It seems very difficult, in our judgment, to hold that the Confederation Act gives any such power of delegating authority, first of creating a quasi offence, and then of punishing it by fine or imprisonment.

"We think it is a power that must be exercised by the legislature alone.

"In all these questions of ultra vires the powers of our legislature, we consider it our wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy.

"We, therefore, enter into no general consideration of the powers of the legislature to legislate on this subject; but, assuming this right so to do, we feel constrained to hold that they cannot devolve or delegate these powers to the discretion of a local board of commissioners.

"We think the defendant has the right to say that he has not offended against any law of the Province, and that the convictions cannot be supported."

The case was taken from the Queen's Bench on appeal to the Court of Appeal for Ontario, under the Ontario Act, 44 Vict. c. 27, and on the 30th of June, 1882, that Court reversed the decision of the Queen's Bench, and affirmed the conviction.

Two questions only appear to have been discussed in the Court of Appeal, 1st, that the legislature of Ontario had not authority to enact such regulations as were enacted by the Board of Commissioners, and to create offences and annex penalties for their infraction; and, 2nd, that if the legislature had such authority, it could not delegate it to the Board of Commissioners, or any other authority outside their own legislative body.

This second ground was that on which the judgment of the Court of Queen's Bench rested.

The judgments delivered in the Court of Appeal by Spragge, C.J., and Burton, J.A., are able and elaborate, and were adopted by Patterson and Morrisson, JJ., and their Lordships have derived considerable aid from a careful consideration of the reasons given in both Courts.

The appellant now seeks to reverse the decision of the Court of Appeal, both on the two grounds on which the case was discussed in that Court and on others technical but substantial, and which were urged before this Board with zeal and ability. The main questions arise on an Act of the legislature of Ontario, and on what have been called the resolutions of the License Commissioners.

The Act in question is chapter 181 of the Revised Statutes of Ontario, 1877, and is cited as "the Liquor License Act."

Sect. 3 of this Act provides for the appointment of a Board of License Commissioners for each city, county, union of counties, or electoral district as the Lieutenant Governor may think fit, and sects. 4 and 5 are as follows:—

"Sect. 4. License Commissioners may, at any time before the first day in each year, pass a resolution, or resolutions, for regulating and determining the matters following, that is to say:—

"(1.) For defining the conditions and qualifications requisite to obtain tavern licenses for the retail, within the municipality, of spirituous, fermented, or other manufactured liquors, and also shop licenses for the sale by retail, within the municipality, of such liquors in shops or places other than taverns, inns, ale-houses, beer-houses, or places of public entertainment.

"(2.) For limiting the number of tavern and shop licenses respectively, and for defining the respective times and

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localities within which, and the persons to whom, such limited number may be issued within the year from the first day of May on one year till the thirtieth day of April inclusive of the next year.

"(3.) For declaring that in cities a number not exceeding ten persons, and in towns a number not exceeding four persons, qualified to have a tavern license, may be exempted from the necessity of having all the tavern accommodation required by law.

"(4.) For regulating the taverns and shops to be licensed.

"(5.) For fixing and defining the duties, powers, and privileges of the inspector of licenses of their district.

"Sect. 5. In and by any such resolution of a Board of License Commissioners the said board may impose penalties for the infraction thereof."

Sect. 43 prohibits the sale of intoxicating liquors from or after the hour of seven of the clock on Saturday till six of the clock on Monday morning thereafter.

Sect. 51 imposes on any person who sells spirituous liquors without the license by law required, or otherwise violates any other provision of the Act, in respect of which violation no other punishment is prescribed, for the first offence a penalty of not less than twenty dollars and not more than fifty dollars, besides costs, and for the second offence imprisonment with hard labour for a period not exceeding three calendar months.

Sect. 52. For punishment of offences against sect. 43 (requiring taverns, &c., to be closed from seven o'clock on Saturday night until six o'clock on Monday morning), a penalty for the first offence of not less than twenty dollars with costs, or fifteen days imprisonment with hard labour, and with increasing penalties for second, third, and fourth offences; and sect. 70 provides that where the resolution of the License Commissioners imposes a penalty it may be recovered and enforced before a magistrate in the manner and to the extent that by-laws of municipal corporations may be enforced under the authority of the Municipal Act.

License Commissioners were duly appointed under this statute, who, on the 25th of April, 1881, in pursuance of its provisions, made the resolution or regulation now questioned in relation to licensed taverns or shops in the city of Toronto, which contains (inter alia) the following paragraphs, viz.,—

"Nor shall any such licensed person, directly or indirectly as aforesaid, permit, allow, or suffer any bowling alley, billiard or bagatelle table to be used, or any games or amusements of the like description to be played in such tavern or shop, or in or upon any premises connected therewith, during the time prohibited by the Liquor License Act, or by this resolution, for the sale of liquor therein.

"Any person or persons guilty of any infraction of any of the provisions of this resolution shall, upon conviction thereof before the police magistrate of the city of Toronto, forfeit and pay a penalty of twenty dollars and costs; and in default of payment thereof forthwith, the said police magistrate shall issue his warrant to levy the said penalty by distress and sale of the goods and chattels of the offender; and in default of sufficient distress in that behalf, the said police magistrate shall by warrant commit the offender to the common gaol of the city of Toronto, with or without hard labour, for the period of fifteen days, unless the said penalty and costs, and all costs of distress and commitment, be sooner paid."

The appellant was the holder of a retail license for his tavern, and had signed an undertaking, as follows:—

"We, the undersigned holders of licenses for taverns and shops in the city of Toronto, respectively acknowledge that we have severally and respectively received a copy of the resolution of the License Commissioners of the city of Toronto to regulate taverns and shops, passed on the 25th day of April last, hereunto annexed, upon the several dates set opposite to our respective signatures hereunder written, and we severally and respectively promise, undertake, and agree to observe and perform the conditions and provisions of such resolution.

"2nd May, Tavern. A. C. Hodge. (L.S.)"

He was also the holder of a billiard license for the city of

Toronto to keep a billiard saloon with one table for the year 1881, and, under it, had a billiard table in his tavern.

He did permit this billiard table to be used as such within the period prohibited by the resolution of the License Commissioners, and it was for that infraction of their rules he was prosecuted and convicted.

The preceding statement of the facts is sufficient to enable their Lordships to determine the questions raised on the appeal.

Mr. Kerr, Q.C., and Mr. Jeune, in their full and very able argument for the appellant, informed their Lordships that the first and principal question in the cause was whether "The Liquor License Act of 1877," in its 4th and 5th sections, was ultra vires of the Ontario legislature, and properly said that it was a matter of importance as between the Dominion Parliament and the legislature of the Province.

Their Lordships do not think it necessary in the present case to lay down any general rule or rules for the construction of the British North America Act. They are impressed with the justice of an observation by Hagarty, C.J., "that in all these questions of ultra vires it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy." They do not forget that in a previous decision on this same statute (*Citizens Insurance Company of Canada* v. *Parsons* (1)) their Lordships recommended that, "in performing the difficult duty of determining such questions, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular question in hand."

The appellants contended that the legislature of Ontario had no power to pass any Act to regulate the liquor traffic; that the whole power to pass such an Act was conferred on the Dominion Parliament, and consequently taken from the provincial legislature, by sect. 91 of the British North America Act, 1867; and that it did not come within any of the classes of subjects assigned exclusively to the provincial legislatures by sect. 92. The class in sect. 91 which the Liquor License Act, 1877, was said to

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(1) 7 App. Cas. 96.

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infringe was No. 2, "The Regulation of Trade and Commerce," and it was urged that the decision of this Board in *Russell* v. *Regina* (1) was conclusive that the whole subject of the liquor traffic was given to the Dominion Parliament, and consequently taken away from the provincial legislature. It appears to their Lordships, however, that the decision of this tribunal in that case has not the effect supposed, and that, when properly considered, it should be taken rather as an authority in support of the judgment of the Court of Appeal.

The sole question there was, whether it was competent to the Dominion Parliament, under its general powers to make laws for the peace, order, and good government of the Dominion, to pass the Canada Temperance Act, 1878, which was intended to be applicable to the several Provinces of the Dominion, or to such parts of the Provinces as should locally adopt it. It was not doubted that the Dominion Parliament had such authority, under sect. 91, unless the subject fell within some one or more of the classes of subjects, which by sect. 92 were assigned exclusively to the legislatures of the Provinces.

It was in that case contended that the subject of the Temperance Act properly belonged to No. 13 of sect 92, "Property and Civil Rights in the Province," which it was said belonged exclusively to the provincial legislature, and it was on what seems to be a misapplication of some of the reasons of this Board in observing on that contention that the appellant's counsel principally relied. These observations should be interpreted according to the subject matter to which they were intended to apply.

Their Lordships, in that case, after comparing the Temperance Act with laws relating to the sale of poisons, observe that,—

"Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada."

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(1) 7 App. Cas. 829.

And again:—

"What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law."

And their Lordships' reasons on that part of the case are thus concluded:—

"The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to their Lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects 'Property and Civil Rights' within the meaning of sub-s. 13."

It appears to their Lordships that *Russell* v. *The Queen* (1), when properly understood, is not an authority in support of the appellant's contention, and their Lordships do not intend to vary or depart from the reasons expressed for their judgment in that case. The principle which that case and the case of the *Citizens Insurance Company* (2) illustrate is, that subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.

Their Lordships proceed now to consider the subject matter and legislative character of sects. 4 and 5 of "the Liquor License Act of 1877, cap 181, Revised Statutes of Ontario." That Act is so far confined in its operation to municipalities in the province of Ontario, and is entirely local in its character and operation. It authorizes the appointment of License Commissioners to act in each municipality, and empowers them to pass, under the name of resolutions, what we know as by-laws, or rules to define the conditions and qualifications requisite for obtaining tavern or shop licenses for sale by retail of spirituous liquors within the municipality; for limiting the number of licenses; for declaring

(1) 7 App. Cas. 829.

(2) 7 App. Cas. 96.

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that a limited number of persons qualified to have tavern licenses may be exempted from having all the tavern accommodation required by law, and for regulating licensed taverns and shops, for defining the duties and powers of license inspectors, and to impose penalties for infraction of their resolutions. These seem to be all matters of a merely local nature in the Province, and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments.

Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted.

The subjects of legislation in the Ontario Act of 1877, sects. 4 and 5, seem to come within the heads Nos. 8, 15, and 16 of sect. 92 of British North America Statute, 1867.

Their Lordships are, therefore, of opinion that, in relation to sects. 4 and 5 of the Act in question, the legislature of Ontario acted within the powers conferred on it by the Imperial Act of 1867, and that in this respect there is no conflict with the powers of the Dominion Parliament.

Assuming that the local legislature had power to legislate to the full extent of the resolutions passed by the License Commissioners, and to have enforced the observance of their enactments by penalties and imprisonment with or without hard labour, it was further contended that the Imperial Parliament had conferred no authority on the local legislature to delegate those powers to the License Commissioners, or any other persons. In other words, that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body, and

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by that body alone. The maxim delegatus non potest delegare was relied on.

It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide.

Their Lordships do not think it necessary to pursue this subject further, save to add that, if by-laws or resolutions are warranted, power to enforce them seems necessary and equally lawful. Their Lordships have now disposed of the real questions in the cause.

Many other objections were raised on the part of the appellant as to the mode in which the License Commissioners exercised the authority conferred on them, some of which do not appear to have been raised in the Court below, and others were disposed of in the course of the argument, their Lordships being clearly of opinion that the resolutions were merely in the nature of municipal or police regulations in relation to licensed houses, and interfering with liberty of action to the extent only that was necessary to prevent disorder and the abuses of liquor licenses. But it was contended that the provincial legislature had no power to impose imprisonment or hard labour for breach of newly created rules or by-laws, and could confer no authority to do so. The argument was principally directed against hard labour. It is not unworthy of observation that this point, as to the power to impose hard labour, was not raised on the rule nisi for the certiorari, nor is it to be found amongst the reasons against the appeal to the Appellate Court in Ontario.

It seems to have been either overlooked or advisedly omitted.

If, as their Lordships have decided, the subjects of legislation come within the powers of the provincial legislature, then No. 15 of sect. 92 of the British North America Act, which provides for "the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section," is applicable to the case before us, and is not in conflict with No. 27 of sect. 91; under these very general terms, "the imposition of punishment by imprisonment for enforcing any law," it seems to their Lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it,—"hard labour;" in other words, that "imprisonment" there means restraint by confinement in a prison, with or without its usual accompaniment, "hard labour."

The provincial legislature having thus the authority to impose imprisonment, with or without hard labour, had also power to delegate similar authority to the municipal body which it created, called the License Commissioners.

It is said, however, that the legislature did not delegate such powers to the License Commissioners, and that therefore the resolution imposing hard labour is void for excess. It seems to their Lordships that this objection is not well founded.

In the first place, by sect. 5 of the Liquor License Act, the Commissioners may impose penalties. Whether the word "penalty" is well adapted to include imprisonment may be questioned, but in this Act it is so used, for sect. 52 imposes on offenders against the provisions of sect. 43 a penalty of twenty dollars or fifteen days' imprisonment, and for a fourth offence a penalty of imprisonment with hard labour only. "Penalty" here seems to be used in its wider sense as equivalent to punishment. It is observable that in sect. 59, where recovery of penalties is dealt with, the Act speaks of "penalties in money." But, supposing that the "penalty" is to be confined to pecuniary penalties, those penalties may, by sect. 70, be recovered and enforced in the manner, and to the extent, that by-laws of municipal councils may be enforced under the authority of the Municipal Act. The word "recover" is an apt word for pecuniary remedies, and the word "enforce" for remedies against the person.

Turning to the Municipal Act, we find that, by sect. 454, municipal councils may pass by-laws for inflicting reasonable fines and penalties for the breach of any by-laws, and for inflicting reasonable punishment by imprisonment, with or without hard labour, for the breach of any by-laws in case the fine cannot be recovered. By sects. 400 to 402 it is provided that fines and penalties may be recovered and enforced by summary conviction before a justice of the peace, and that, where the prosecution is for an offence against a municipal by-law, the justice may award the whole or such part of the penalty or punishment imposed by the by-law as he thinks fit; and that, if there is no distress found out of which a pecuniary penalty can be levied, the justice may commit the offender to prison for the term, or some part thereof, specified in the by-law. If these by-laws are to be enforced at all by fine or imprisonment, it is necessary that they should specify some amount of fine and some term of imprisonment.

The Liquor License Act then gives to the Commissioners either power to impose a penalty against the person directly, or power to impose a money penalty, which, when imposed, may be enforced according to sects. 454 and 400–2 of the Municipal Act. In either case, the Municipal Act must be read to find the manner of enforcing the penalty, and the extent to which it may be enforced. The most reasonable way of construing statutes so framed is to read into the later one the passages of the former which are referred to. So reading these two statutes, the Commissioners have the same power of enforcing the penalties they impose as the Councils have of enforcing their by-laws, whether they can impose penalties against the person directly, or only indirectly as the means of enforcing money penalties. In either case, their resolution must, in order to give the magistrate jurisdiction, specify the amount of punishment. In either case, their resolution now under discussion is altogether within the powers conferred upon them.

Their Lordships do not think it necessary or useful to advert to some minor points of discussion, and are, on the whole, of opinion that the decision of the Court of Appeal of Ontario should be affirmed, and this appeal dismissed, with costs, and will so humbly advise Her Majesty.

Solicitors for appellant: *Bompas, Bischoff, & Dodgson.*
Solicitors for respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

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EMERY AND OTHERS . . . . APPELLANTS;

AND

CICHERO . . . . RESPONDENT.

THE "ARKLOW."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF NEW BRUNSWICK.

Collision—Negligence by Complaining Vessel.

Where there has been a departure from an important rule of navigation, if the absence of due observance of the rule can by any possibility have contributed to the accident, then the party in default cannot be excused.

Where the lights of the complaining vessel were not properly burning, and were not visible on board the other vessel, *held*, that in the absence of proof that this latter was also to blame, the suit must be dismissed.

APPEAL from a decree of the Vice-Admiralty Court of New Brunswick (Nov. 29, 1881), condemning the *Arklow* in $24,000 damages and in costs.

The facts of the case appear in the judgment of their Lordships.

Myburgh, Q.C., and *Beaufort*, for the appellants.

Hall, Q.C., and *Bucknill*, for the respondent.

The judgment of their Lordships was delivered by

SIR JAMES HANNEN :—

The case presented on behalf of the *Bunin*, the complaining vessel below, was as follows: That on the 30th of March, 1881, as she was proceeding on a voyage from Havre to Baltimore, at 2 o'clock in the morning, the weather being dark but clear and the wind from the north-west, she was steering a course south-west by west half-west close hauled on the starboard tack; that her lights were properly burning; and that she was proceeding at the rate of 6½ knots an hour when the red light of a ship, which proved to be the *Arklow*, was seen on the starboard bow. That she, the *Bunin*, kept her course; but that the *Arklow*, by some unaccountable mismanagement, as it is stated, ran into the *Bunin*, striking her about the fore rigging on the starboard side with her stern.

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* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR JAMES HANNEN, and SIR ARTHUR HOBHOUSE.

On the other hand, for the *Arklow* it was alleged that she was steering a course east by south half-south, the wind being in the north, when a vessel was seen a point and a half on her port bow shewing no lights whatever; that she was thought to be going the same way as the *Arklow*, but that, after examination through the glass, and watching her for some appreciable time, it was discovered that she was approaching the *Arklow* under a starboard helm; that then the *Arklow's* helm was put hard aport and her after sails taken off.

In confirmation of the statement that there were no lights visible upon the *Bunin*, it is alleged and stated by several witnesses that a green light was seen moving upon the *Bunin* just before the collision; and in confirmation of the statement that the *Bunin* did not keep her course but approached under a starboard helm, it is stated that her spanker jibed from port to starboard—it is said, indeed, just before the collision.

Now, in the circumstances alleged on the one side and on the other, it was undoubtedly the duty of the *Bunin* to keep her course, and it was primarily the duty of the *Arklow* to keep clear; but the *Arklow* alleges, by way of excusing herself for not having kept clear, that there was no light visible on the *Bunin*, and that it was therefore impossible to know in what direction she was sailing, and therefore impossible to take measures for the purpose of preventing the collision with her.

The first question of importance in the case is whether or not the lights of the *Bunin* were burning for any serviceable purpose. On this point the learned judge in the Court below, after consulting the assessors, says: "I consider the point whether the *Bunin* carried proper lights left in so much doubt by the conflict of evidence, that I am of opinion that the lights of the *Bunin* were not fairly visible to the *Arklow*;" and then he goes on to deal with the case upon that footing. The peculiar language which is used by the learned judge about their not being fairly visible may possibly have reference to the evidence which has been given that a green light was seen, not in its proper place, but moving on the *Bunin*, immediately before the collision. Their Lordships agree in the view which was taken by the learned judge below upon this point that the lights of the *Bunin* were not in such a position as to be visible to those on board the *Arklow*, and that those on board the *Bunin* are responsible for that departure from the proper rules of navigation.

Their Lordships arrive at this conclusion upon an examination of the evidence on the one side and on the other. It is very much to be regretted that the Court below was obliged to rely solely upon affidavits which, from their language and general contents, it is pretty plain were drawn by somebody with a view to the supposed facts of the case, and were then laid before the witnesses for the purpose of getting their evidence, and leaving them, as it were, to take exception to anything which they found in those statements. Thus, all the witnesses but one on behalf of the *Bunin* say, in general terms, that lights were burning according to the regulation, but there is only one of them who speaks to the fact of his having actually seen that the lights were burning at the time of the collision, and that is the witness Lazzarini, whose duty it appears to have been to light and trim the lamps, which he says he had done at 8 o'clock. He does, indeed, say that when he was called on deck by hearing that something wrong had happened he did see that the lights were burning. On the other hand, the witnesses for the *Arklow* all agree that there was no light visible on the *Bunin*; and they make that statement with certain particularity which impresses their Lordships in favour of their statements as against the general statements, with the exception mentioned, of those on board the *Bunin*. For instance, it is stated that, the vessel having been reported by the look-out man, and the mate and another of the crew who was with him having seen the vessel looming in the distance, the mate fetched the captain's glasses for the purpose of examining it more carefully. That is a particularity which cannot be disregarded, except on the supposition that the mate and the witness who confirms him are deliberately stating that which they must know to be false, and going much further than a mere assertion that they were doing their duty. In addition to that, there are several witnesses who say that they saw a green light moving on the vessel immediately before the collision, as though the green light had, either for the purpose of being trimmed or from some other accident, not been in its place, but that when the vessel was found to be approaching another the green light was being moved from one place to another.

Their Lordships, therefore, come to the conclusion that the lights of the *Bunin* were not properly burning. But the learned judge below says that this question of the lights is immaterial when it appears that their absence did not cause the collision. On this part of the case their Lordships are unable to concur with the judgment of the learned judge below. The principle in cases of this kind, where there has been a departure from an important rule of navigation, is this, that if the absence of due observance of the rule can by any possibility have contributed to the accident, then that the party in default cannot be excused. On this point their Lordships can entertain no doubt that the absence of proper lights must have occasioned an entire change in the course of events which followed upon the *Bunin* being visible to the *Arklow*. Without those lights the statement made by the witnesses on board the *Arklow* commends itself at once to credence that they did not know in what direction this vessel was going, and that it took an appreciable time before a judgment could be formed upon that subject, during the whole of which time it must have remained a matter of pure chance whether it would be right to take one manœuvre or another. Their Lordships are therefore of opinion that the *Bunin* was clearly to blame, and that she was to blame in a matter which makes her responsible.

The only question that remains, therefore, is whether or not it has been shewn that the *Arklow* was also to blame. It lies on the *Bunin*, which is shewn to have been in default, to establish, to the satisfaction of the tribunal that has to determine it, that the *Arklow* was in fault. Now, on this part of the case it is to be observed that the time which has to be dealt with is very short.

The vessels were approaching at a speed which would bring them together at the rate of a mile in five minutes. Reference has been made to the marginal note upon the diagram furnished by the *Arklow*, in which it is said that when first seen the *Bunin* was about six cables' distance, which would be a distance of 1200 yards. One of the witnesses for the *Arklow* says that the *Bunin* was seen about four minutes before the collision. It is obvious that these statements as to time and distance cannot be dealt with as exact computations, but only indicate the rough conjectures which the witnesses were able to make at the time. But it is obvious that some space of time must have been occupied in fetching the glasses, which would diminish the period of time with which we are dealing. Secondly, it is stated, and no reason to doubt it is suggested, that the helm of the *Arklow* had been ported before the collision; that is to say, that a step had been taken for the purpose of avoiding the approaching danger; and Nilson, one of the witnesses, says that the *Arklow* had under her port helm come round two points, and that this had been done when it was seen that the *Bunin* was approaching under a starboard helm. It is clear, therefore, that we have but a very short space of time indeed during which the hesitation on the part ot those on the *Arklow* was manifested as to what course they should take. Considering the difficulty occasioned by the absence of lights on board the *Bunin*, which prevented the possibility of seeing what course she was steering, their Lordships are of opinion that it has not been established that there was negligence on the part of those on board the *Arklow* in not sooner porting the helm, as it is clear she had to some extent done before the collision.

Another point has been discussed, which was not dealt with in the Court below, and that is whether or not the *Bunin* kept her course. Her witnesses allege that she did keep her course. On the part of the *Arklow* it is alleged that she came round under a starboard helm, and so came down upon the *Arklow*. In support of this statement it is alleged that she jibed; and it has been argued that credence ought not to be given to that statement because it is said the *Arklow* had gone off only to the extent of half a point, while it is represented that the *Bunin* had got

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round a great number of points,—the exact number it is not necessary to specify, but so as to bring her head pointing south before it would be possible that she would jibe. It is to be observed, however, that the two periods of time that were referred to by Mr. Hall are not properly to be compared, because the evidence on the part of the *Arklow* is that it was discovered that the *Bunin* was, to use the expression of the witnesses, coming down upon them under a starboard helm, and that it was apparently which shewed the direction which the *Bunin* was taking, and it was then, after that had been seen, that the helm of the *Arklow* was ported. There was, therefore, some time before the porting of the helm during which the starboarding of the helm of the *Bunin* had taken place. But, further than this, it is to be observed that where a collision of this kind occurs the exact succession or concurrence of events is not accurately noted by the witnesses, and it may well be that the jibing of the spanker, which is referred to by the witnesses as taking place immediately before the collision, may in fact have taken place at the time of the collision, and in consequence of the collision by the head of the *Bunin* being driven sharply round.

On the whole, their Lordships are of opinion that it has been established that the *Bunin* was to blame, and that it has not been established that the *Arklow* was to blame; and their Lordships will, therefore, humbly advise Her Majesty that the decision of the Court below should be reversed, with costs.

Solicitors for appellants: *Stokes, Saunders, & Stokes.*
Solicitors for respondent: *T. Cooper & Co.*

[PRIVY COUNCIL.]

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JAMES HENRY THOMAS . . . . . . DEFENDANT;

AND

FREDERICK SHERWOOD AND ANOTHER. . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Western Australian Railways Act of 1878 (42 *Vict. No.* 31), *ss.* 14 *and* 16—*Notice—Right of Resumption—Compensation.*

Held, in a case where the Crown had a power of resumption under the terms of its grant, and had given lawful notice in exercise of such power, such notice must not be deemed to be under sect. 12 of the Railways Act of 1878 (entitling the parties affected to compensation under sect. 14); secus where notice could not have been lawfully given except under this Act.

APPEAL from a judgment of the Supreme Court (July 13, 1881) in favour of the respondents' claim to recover compensation from the appellant, as the Commissioner of Railways for the colony, for a piece of land taken or reserved by him for the purposes of the Eastern Railway.

The facts are stated in the judgment of their Lordships.

The Solicitor-General (*Sir F. Herschell*) and *J. G. Wood*, for the appellant.

The respondents did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The question in this appeal is whether, some land of the plaintiffs having been taken by the Commissioner of Railways for Western Australia for the purposes of a railway, the plaintiffs are or are not entitled to compensation.

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* *Present:*—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

The land in question is parcel of an estate of 968 acres, granted by the Crown to Mary Hutton, the predecessor in title of the plaintiffs, in fee at a peppercorn rent, on the 5th of March, 1844. This grant was subject to a proviso, which so far as is material in the present case, is as follows:—

"Provided, nevertheless, that it shall at all times be lawful for us, our heirs and successors, or for any person or persons acting in that behalf, by our or their authority, to resume and enter upon possession of any part of the said lands, which it may at any time by us, our heirs or successors, be deemed necessary to resume, for making roads, canals, bridges, towing paths, or other works of public utility or convenience, and such lands so resumed to hold to us, our heirs and successors, as of our or their former estate, without making to the said Mary Hutton, her heirs or assigns, any compensation in respect thereof, so nevertheless that the lands to be resumed shall not exceed one-twentieth part in the whole of the lands aforesaid, and that no such resumption be made of any lands on which any buildings may have been erected, or which may be used as gardens or otherwise for the more convenient occupation of any such buildings."

On the 24th of July, 1878, an Act was passed authorizing the construction of a railway from Freemantle to Guildford in the colony.

On the same day a general Act was passed consolidating and amending previous Acts relating to railways, which Act was to be deemed incorporated with and form part of any special railway Act.

The following are the sections of the latter Act material to the present case:—

Sect. 5 gives the Government power to appoint a Commissioner of Railways.

Sect. 6 authorizes the Commissioner with the approval and consent of the Governor testified in writing, to enter into all contracts relative to the railway, and to do all other acts which he is authorized by the Act to perform.

Sect. 12 authorizes the Commissioner, or any person acting under his authority, to enter upon and take for the purpose of the railway "any land along the line, or within any lawful deviation from such line, over which the railway is authorized to be constructed as may, in the judgment of the Commissioner, be necessary for the purpose." At the end of the section is this proviso:—

"That nothing in this section contained shall be deemed to apply to the waste lands of the Crown or to in any way affect any right as to any land heretofore granted or otherwise disposed of by the Crown, reserved to Her Majesty the Queen, her heirs and successors, or any person or persons acting in that behalf, by her or their authority to do any of the acts or things by this section authorized to be done; *and nothing shall be deemed to be done in pursuance of and by virtue of the powers by this section conferred which, if this Act had not been passed, might lawfully have been done by Her Majesty the Queen, her heirs and successors, or any person or persons acting in that behalf, by her or their authority, under any such reservation as aforesaid.*"

Sect. 13 provides for notice being given when land is taken under the preceding section.

Sect. 14 runs thus:—

"In all cases in which any land is taken, entered upon, or used in pursuance or by virtue of the powers by the 12th section conferred full compensation shall be made to the owner or owners of such land."

Sect. 16 is in these terms:—

"16. Any person whose land is taken, entered upon, or used in pursuance and by virtue of the provisions of this Act, or whose land is resumed, entered upon, or used for the purpose of a railway by Her Majesty, her heirs, or successors, or any person acting under her or their authority, under any reservation of right as aforesaid, and who shall consider himself entitled to compensation in respect of such land being taken or resumed, entered upon, or used (such person being hereinafter referred to as "the claimant"), shall send in to the Commissioner a notice in writing

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according to Form B in the schedule, setting forth the nature of his interest in such land and the amount of compensation which he claims in respect of the premises, and accompanied by all deeds and documents necessary to establish his title to such land. If the Commissioner shall be satisfied as to the title of the claimant to such land, and as to his right to recover compensation in respect of such land being taken or resumed, entered upon, or used as aforesaid, and as to the amount of compensation claimed by him as aforesaid, he shall, with the approval of the Governor in Executive Council, pay such amount to the claimant; if he shall be satisfied as to the title and right to compensation as aforesaid, but thinks the amount of compensation claimed excessive, he shall with the approval of the Governor in Executive Council, send him a written notice according to Form C, in the schedule, offering such amount of compensation as he may think sufficient and such proceedings shall thereupon be taken as in the next section set forth. If the Commissioner shall not be satisfied as to the title of the claimant to such land or as to his right to compensation in respect of the same being taken, or resumed, entered upon, or used as aforesaid, he shall give notice to such person according to Form D in the schedule, that he repudiates his claim; but before giving such notice of repudiation, it shall be lawful for any judge of the Supreme Court in Chambers, on the application of the Commissioner, to order the claimant to produce such further evidence of title as the Commissioner may require."

Sect. 31 enables the claimant to bring an action to recover compensation if the Commissioner repudiates his claim.

The defendant, who has been duly appointed Commissioner of Railways, gave to the plaintiff the following notice:—

"In the matter of 'The Railways Act, 1878,' and of certain land intended to be taken and resumed for the purposes of the Eastern Railway.

"To Messrs. F. & H. Sherwood, of Perth, in the colony of West Australia.

"Take notice that it is the intention to take for the purposes

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of the Eastern Railway the following land in the Swan District, whereof you are the owners:—

Number.		Quantity intended to be taken.
On Plan and Book of of Reference.	In the Survey Office.	
No. 150.	Location X	A. R. P. 4 3 27

"Dated this seventh day of May, 1879.

"J. H. Thomas, Commissioner of Railways."

The plaintiff gave to the Commissioner the following notice, in accordance with Form B, given in the schedule to the Act:—

"Form B.

"In the matter of 'The Railways Act, 1878,' and of 'certain land [*here insert* 'taken,' *or* 'resumed,' *or* 'entered upon,' *or* 'used,' *as the case may be*] taken for the purposes of the Eastern Railway.

"To the Commissioner of Railways, Western Australia, &c., &c., &c.

"Sir,—We have the honour to inform you that we are the [*here describe* 'nature of interest'] owners of certain land [*here describe the same*], described in the schedule 'A' as Swan Location X, situate on the West Guildford Road, which has been taken [*here insert* 'taken,' *or* 'resumed,' *or* 'entered upon,' *or* 'used,' *as the case may be*], for the purposes of the Eastern Railway.

"We enclose the following title deeds, shewing our interest in the said lands [*here set out a list of deeds*].

"We consider that we are entitled to compensation in respect of the said land, and we claim as full compensation for taking of the same, and including all buildings and fences thereon, and as damages for all injury done to the adjoining land belonging to us, by severance or otherwise, the sum of $\frac{\text{£480 0s. 3}d.}{\text{£408 7s. 9}d.,}$ which sum we hereby declare to be our full claim in respect of matters aforesaid.

"We have the honour to be, Sir,
"Your obedient servants,
"F. & H. Sherwood."

The Commissioner thereupon gave to the plaintiffs the following notice, in accordance with Form D. in the schedule :—

"Form D.

"In the matter of 'The Railways Act, 1878,' and of certain land taken for the purposes of the Eastern Railway.

"Sir,—With reference to your letter of the day of , in which you inform me that you are the owners of certain land described in your said letter, which land has been taken for the purpose of the Eastern Railway, and in which you make a claim of £408 7*s.* 9*d.*, as compensation for the land so taken, including all buildings and fences thereon, and as damages for all injury done to the adjoining land belonging to you, by severance or otherwise, I have now the honour to inform you, having submitted your title of the said land and your claim to compensation, as aforesaid, to the proper legal authority, that you have failed to satisfy me as to your right to compensation as set forth in your said letter, and I accordingly, pursuant to the provisions of 'The Railways Act, 1878,' repudiate your said claim.

"I have the honour to be,
"Your obedient servant,
Jas. Hy. Thomas,
Commissioner of Railways.

"Swan Location X. (Claim 64.)
"Messrs. F. & H. Sherwood, Perth."

Thereupon the plaintiffs brought an action, in which, by consent, a special case was stated for the opinion of the Court.

The case finds that the land in question is "country land, and not town or suburban land," and that, although a portion of the whole land granted had been before resumed, that portion, together with that now taken, does not amount to one twentieth of the whole.

On the special case, judgment was given by the Chief Justice for the plaintiffs, and against this judgment the defendant now appeals.

Their Lordships regret that the Chief Justice has not complied with their Lordships' order of the 12th of February, 1845, directing judges to forward to this Board the reasons on which their judgments are founded. Under the special circumstances of the case, the Solicitor-General was permitted to read an extract from a letter by the Chief Justice to the Governor of the colony, purporting to give some of the reasons for his judgment. This extract and "the points" of the respective parties are the only materials from which their Lordships are able to conjecture how the case was presented to the Court, and how the Court dealt with it.

They understand the Chief Justice to state that there was no question of the right of the Crown to resume the land, if that right was properly exercised; but that, in his opinion, it was not properly exercised, and that the notice given by the Commissioner must be taken to have been given under the 12th section of the Act.

No mode of procedure appears to be prescribed by the law of the colony for the taking by way of resumption of lands granted by the Crown, but, whether a notice previous to the taking them of the intention to do so be or be not strictly necessary, it is manifestly proper and convenient.

The notice of the 7th of May, 1879, appears to their Lordships a notice which might lawfully and properly have been given by the Crown or its agent in the exercise of the power of resumption if the Act had not been passed, not the less so because it may also be a good notice under the Act; if this is so, the words of the proviso to the 12th section are express, that the giving it shall not be deemed to be done in pursuance of or by virtue of the powers conferred by that section. If it is not a notice under sect. 12, sect. 14, the only section giving compensation, does not apply. Nor does sect. 16 help the plaintiffs. That section was manifestly necessary in contemplation of two possible cases,—1st, where the land, or a portion of it, claimed in the notice, should be town land, whereupon there would be a right to compensation, not under the Railway Act, but by virtue of the terms of the grant applicable to town lands; 2nd, where the land or a portion of it should not be resumable for any reason, either because it had been built upon, or was used as gardens for the more convenient occupation of buildings, or because one twentieth of the land had been before resumed; in either of which cases the notice could not have been lawfully given if the Act had not passed, and would, therefore, properly be treated as a notice under the Act.

But the land in question is not town, or even suburban land, nor has it been built upon or occupied as gardens attached to buildings. It is true that the notice following Form B claims compensation for the land "including all buildings and fences thereon," but in the special case there is no allegation of its having been built upon, and no inference that it has been can be drawn from the description "country land and not town or suburban land;" there is no trace of any claim to compensation on this ground in the plaintiffs' "points," and so much of the reasons of the judgment which was read to their Lordships intimated that the right of the Crown to resume, if properly exercised, was not questioned.

Further, it is stated in the special case that the quantity now resumed, added to that resumed before, is less than one twentieth of the whole. There is no ground for a contention raised in the plaintiffs' points that by the taking any portion, however small, the power of the Crown to resume is exhausted, it is a power to be exercised from time to time as occasion arises.

From these considerations it results—

1. That the land in question was land which the Crown had power to resume.
2. That the notice given was one which might lawfully have been given, by or on behalf of the Crown, in exercise of its powers of resumption.
3. That if so, such notice must not be deemed to have been given under sect. 12 of the Railway Act, the proviso of which has some appearance of being enacted for the express purpose of preventing claims such as the present being made.
4. That if so, the plaintiffs have no right to compensation.

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The judgment was therefore wrong. Their Lordships will humbly advise Her Majesty that the judgment appealed against be reversed, and that judgment with costs of the defence in the Court below should be entered up for the defendant. There will be no costs of this appeal.

Solicitors for the appellant: *Sutton & Ommanney.*

[PRIVY COUNCIL.]

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DUCONDU AND OTHERS . . . . DEFENDANTS.

AND

DUPUY . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Consolidated Statutes of Canada, c. 23—Priority of Licenses—Timber Limits—Warranty on Sale.

On a sale of "timber limits" held under licenses in pursuance of the Consolidated Statutes of Canada, c. 23, a clause of simple warranty (garantie de tous troubles généralement quelconques) does not operate to protect the purchaser against eviction by a person claiming to be entitled under a prior license to a portion of the limits sold.

THIS was an appeal by special leave from a judgment of the Supreme Court of Canada (December 13th, 1881), which by a majority consisting of three judges to two reversed a unanimous judgment of the Queen's Bench (September 17th, 1880), affirming a judgment of the Superior Court of the district of Joliette, in favour of the present appellants, who were the defendants in the suit.

The action was brought to recover damages for a breach of a covenant for title under the following circumstances:

The appellants were the testamentary heirs of one Edward Scallon who died on the 15th of March, 1864. In July, 1858, Edward Scallon was the holder of certain licenses from the

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* *Present:*—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ARTHUR HOBHOUSE.

Crown for "timber limits" situated on the river L'Assomption. These licenses are issued under the provisions of chapter 23 of the Consolidated Statutes of Canada, which provide that the Commissioner of Crown Lands may grant timber licenses available for one year, but capable of renewal subject to such regulations as may from time to time be established by the Governor in Council, and that if in consequence of any incorrectness of survey, or other error or cause whatsoever, a license is found to comprise lands included in a license of a prior date, the license last granted shall be void in so far as it interferes with the one previously issued.

No. 12 of the regulations issued under the above-mentioned statute on the 12th of June, 1866, was in the following terms:

"Timber Berths, etc., cancelled or amended."

By a deed dated the 12th of July, 1858, Edward Scallon promised to sell to one Benjamin Peck all the right and title obtained by the seller from the Crown to certain timber limits situated on the banks of L'Assomption river and its tributaries. Before the date of the next mentioned deed, all Peck's interest had become vested in Cushing. The respondent was Cushing's assignee in bankruptcy. By a notarial deed executed by the appellants after his death, dated the 16th of March, 1865, the appellants confirmed the sale of the licenses by the deed of 1858. By a further deed dated the 22nd of October, 1866, executed by one McConville as attorney to the appellants, after reciting that Scallon was under an obligation to sell 256 miles of limits, and that there existed a deficit of fifty miles, provided as follows: "le dit Sieur McConville pour et au nom qu'il agit voulant compléter le déficit qui se trouve, a par les présentes cédé et transporté avec la garantie de tous troubles généralement quelconques au dit Theophilus Cushing ici présent et acceptant la dite quantité de cinquante milles de limites sur la dite rivière de l'Assomption et désignée comme suit en langue anglaise, savoir."

No. 25, twenty-five square miles. Commencing at the upper end limit, No. 94 on the south-west side of L'Assomption river, granted to late Edward Scallon, and extending five miles on the said river and five miles back from its banks, making a limit of twenty-five square miles, not to interfere with limits granted or to be renewed in virtue of prior regulations.

A description in similar terms followed of license No. 26.

Licenses No. 25 and 26 were renewed by Cushing for the years 1867–8 and 1868–9, and in January, 1869, Cushing was evicted from a portion of the territory comprised in those licenses by one Hall, who was assumed for the purpose of the judgment in this case to have been entitled under licenses of an earlier date than those assigned to Cushing to a portion of limits, No. 25 and 26.

Kenelm Digby, for the appellants :—

Assuming that an eviction has been proved by reason of Hall holding earlier licenses for limits overlapping those assigned to Cushing, the warranty given by the appellants did not extend to protect Cushing against such disturbance. The warranty is in the common form known in French and Canadian law as the clause of simple warranty, and does not, except in certain cases, of which the present is not one, extend further than the warranty which by Canadian law is implied in every case of a sale: see Troplong, Vente, vol. i. No. 432. Both in the implied and in the ordinary express warranty the obligations of the vendor are limited to warrant the purchaser against eviction "of the whole or any part of *the thing sold*": Art. 1508; and in this case, having regard to the statutory provisions that the licenses are void in so far as they interfere with limits already granted, and to the limitation contained in the licenses themselves, and embodied in the deed of the 22nd of October, 1866, the "thing sold" is limited to the rights purported to be conveyed by the licenses themselves, and are subject to the contingency which appears upon their face. To protect a purchaser against the happening of this contingency would require a special warranty, the ordinary clause does not cover it any more than it would protect a purchaser of land against the exercise of a right of way or other incumbrance subject to which land was expressed to be sold.

Fullarton, for the Respondents, contended that the acts of

Mr. Hall and the decision and subsequent acts and orders of the Crown Lands Department were a "trouble" within the meaning of the express warranty in the deed of the 22nd of October, 1866. Further, apart from such express warranty, the sellers were bound to warrant the purchaser against eviction of the whole or part of the thing sold by reason of any right existing at the time of the sale thereof. [He referred to C. C. L. C. 1506–1512, 1518; Troplong, De la vente, par. 264.] There was no delivery of the thing sold; C. C. L. C. 1492, 1493, 1500–1502. The thing sold was "fifty miles of limits," and not merely the licenses for them.

K. Digby was not called on to reply.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

On the 10th of July, 1858, Edward Scallon, who is the predecessor in title of the appellants, contracted with one Benjamin Peck, the predecessor in title of the respondent, to sell to him certain property called timber limits. The nature of a timber limit is this:—Annual licenses are granted by the Commissioner of Crown Lands to take possession of certain areas of land, to cut timber within those areas or limits. There is an express provision in the statute that if any license is found to cover ground already occupied by a prior license the subsequent license shall to that extent be null and void. Such being the nature of the property, Scallon contracted to sell all the right and title obtained by him from the Crown. The purchase-money was to be paid by instalments, and when the last instalment was paid the conveyance was to be completed by Scallon. The money was paid; and Scallon being dead, his heirs, the present appellants, executed a deed, dated the 16th of March, 1865, for the purpose of completing the conveyance to Cushing, in whom Peck's interest was then vested. In that deed it is stated that they are acting in execution of the prior contract; and they convey and release, with a guarantee against disturbance, all the immovable property and rights which Scallon had promised. Then they proceed to describe it; and they describe it in precisely the same terms as are used in the contract of 1858. The property so described is said to be comprised in thirteen different licenses, which purport to convey a title to an area of 256 miles. Among those licenses are two, numbered 97 and 98, which purport to convey title each to an area of twenty-five miles on the Assomption river; and the heirs of Scallon declare that the licenses have been renewed up to that time by Peck and his representatives. It turned out that in point of fact Nos. 97 and 98 had not been renewed, and it seems doubtful whether they were in existence at the time of the contract of 1858. Mr. Fullarton has argued his case on the hypothesis, which he takes as most favourable to himself, that they were not in existence at that time. On that discovery the parties come together again, and the heirs of Scallon agree to make good the loss accruing to the successors in title of Peck by the non-existence of licenses 97 and 98. The arrangement made by them is contained in a deed of the 22nd of October, 1866, executed by one McConville, who for the present purpose is assumed to be the lawful agent of the appellants. The language used by the parties in that deed is, as stated in English, to the following effect: After referring to the prior transactions, they say, "In virtue of that deed"—that is, the deed of 1858—"Scallon was bound to sell 256 miles of limits for cutting wood on Crown lands; and as there is found a deficit of fifty miles to complete the said quantity of 256 miles granted to Cushing, McConville, in the name of his principals, desiring to fill up the deficit which has been found, has by these presents granted and conveyed, with warranty against all disturbances generally, whatsoever they may be, to Cushing, the said quantity of fifty miles of limits on the said River Assomption, described as follows in the English tongue." The description is contained in two other licenses, Nos. 25 and 26. License 25 is in these terms: "Commencing at the upper end, limit No. 94 on the south-west side of L'Assomption river, granted to the late Edward Scallon, and extending five miles on the said river and five miles back from its banks, making a limit of twenty-five square miles, not to interfere with limits granted or to be renewed in virtue of regulations." Mutatis mutandis, license No. 26 is in the same terms. The deed states that McConville has, for his principals, paid the sum of $500 to Cushing, on account generally of all claims which Cushing may have against the heirs of Scallon, and Cushing further declares that by reason of this deed he has nothing to claim, for any cause or reason whatever, against the heirs of Scallon; and a general release is given. McConville on his part gives a general release to Cushing for all claims by the heirs of Scallon.

It is on that deed that the present question arises. The difficulty which has arisen is this: that when the grantee, Cushing, came to work on the limits contained in the licenses 25 and 26 he was stopped by a man of the name of Hall, who claimed to be possessed of the same land in virtue of a prior license from the Crown. There has been a great deal of controversy as to whether the interference by Hall has been properly proved in this suit; but for the purposes of the present decision all that part of the case is assumed in favour of the respondents. Cushing could not get the benefit of all the land described in licenses 25 and 26 by reason of a prior grant to Hall. Cushing accordingly, or his assignee, Dupuy, the present respondent, sues the heirs of Scallon upon the warranty which he alleges that they have given for fifty square miles of timber limits. The question is whether the appellants have given a warranty for those fifty miles of limits absolutely, or only a warranty for the licenses which purport to give a title to the fifty square miles. It is a question of very considerable difficulty. The Courts in Montreal have taken one view in favour of the appellants; and the majority of the Supreme Court has taken the other view in favour of the respondent.

There has been a good deal of question, both in the Courts below and at the bar here, whether it is proper to go behind the deed of October, 1866. It is quite plain what the course of a Court of Justice must be. In one sense we cannot go behind the deed of 1866; that is to say, the rights of the parties must be regulated by the construction of that deed, and of that deed alone. In another sense we have to go behind it, because the deed itself refers to prior transactions. It professes to be founded upon the liability arising out of those prior transactions; and a Court cannot properly construe the deed without ascertaining what the position of the parties was at the time when they came to execute it. Now the position of the parties appears to their Lordships to be this: Scallon contracted to sell his right and title to the thirteen licenses, which purport to contain 256 square miles. He was not liable to make good a title to the 256 square miles any further than the licenses themselves made a title to them. But he was liable to have and to deliver the licenses which he purported to sell. In point of fact he had not got two of those licenses, and when that fact is discovered his heirs come to make up the deficit, as they call it "compléter le déficit;" that is to say, to do that which Scallon was bound to do. At that time Scallon was bound to make good in some way the loss sustained by the non-existence of licenses 97 and 98.

What then do the parties do? They make up the deficit by assigning two other licenses. They call it "fifty miles of limits described as follows." Even taking the word "limits" to be an ambiguous term, their Lordships are of opinion that "limits described as follows" must be taken to indicate the thing which is sold according to the description which is given. Into that description is imported the condition that the license sold is not to interfere with limits granted or to be renewed in virtue of regulations. Therefore the two licenses which formed the subject of the assignment of 1866 are to be taken exactly as the two missing licenses which formed the subject of the contract of 1858 were taken, viz., as conveying only such right, title, and interest as the vendors had obtained from the Crown. Now the guarantee can only extend to the thing that is sold, the very subject of the assignment. If the licenses 25 and 26 were not forthcoming, or if there was any defect in the title of the heirs of Scallon to those licenses, the guarantee might have some operation; but the licenses are forthcoming and have been handed over, and there is no guarantee against a deficiency by reason of a prior grant.

The result is, that, assuming the respondent to be right in all the issues raised by him with respect to the breach of the alleged guarantee, their Lordships are of opinion that no guarantee exists to cover that alleged breach.

Under these circumstances their Lordships will humbly advise Her Majesty that the decree of the Supreme Court be reversed, and the decrees of the lower Courts restored. The costs of the appeal will follow the result.

Solicitors for appellants: *Ingle, Cooper, & Holmes.*
Solicitors for respondent: *Ashurst, Morris, Crisp, & Co.*

[PRIVY COUNCIL.]

J. C.*
1883
Nov. 6, 7;
Dec. 1.

THE COLONIAL BUILDING AND INVESTMENT ASSOCIATION . . . . } DEFENDANTS;

AND

THE ATTORNEY-GENERAL OF QUEBEC PLAINTIFF.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, LOWER CANADA.

British North America Act, 1867, *ss.* 91, 92—*Canadian Act*, 37 *Vict. c.* 103—*Powers of Dominion Parliament.*

Held, that Canadian Act 37 Vict. c. 103, which created a corporation with power to carry on certain definite kinds of business within the Dominion was within the legislative competence of the Dominion Parliament. The fact that the corporation chose to confine the exercise of its powers to one province and to local and provincial objects did not affect its status as a corporation, or operate to render its original incorporation illegal as ultra vires of the said Parliament.

Held, further, that the corporation could not be prohibited generally from acting as such within the province; nor could it be restrained from doing specified acts in violation of the provincial law upon a petition not directed and adapted to that purpose.

APPEAL from a judgment of the Court of Queen's Bench (March 24, 1882) reversing a judgment of the Superior Court (July 9, 1881) in favour of the appellants in the matter of a petition by the respondent for a declaration that the appellants' association had been and was illegally formed and incorporated, and for an order dissolving the said association, and prohibiting the appellants from acting in future as such corporation.

The proceedings out of which this appeal arose were instituted by the Attorney-General for Quebec, under art. 997 and following articles of the Code of Civil Procedure for Lower Canada. They were commenced by a petition in the nature of an information filed the 1st of April, 1881, followed by an answer on the 7th of April, 1881. The association was incorporated by the Canadian

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* *Present:*—LORD FITZGERALD, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

Act 37 Vict. c. 103. The pleadings, the Act, and the provisions of the Civil Procedure Code on which the proceedings were based, sufficiently appear in the judgment of their Lordships.

On the 24th of March, 1882, the Court of Queen's Bench (Dorion, C.J., Tessier, Cross, and Baby, JJ.) delivered judgment (Monk, J., dissentiente), reversing the judgment of the Superior Court, which had dismissed the petition and quashed the writ, and instead thereof adjudged and declared that the defendant company had and has no right to act as a corporation for or in respect of any of the operations of buying, leasing, or selling of landed property, buildings, and appurtenances thereof; or the purchase of building materials to construct villas, homesteads, cottages, or other buildings and premises, or the selling, or letting of the same; or the establishment of a building or subscription fund for investment or building purposes; or the acting as agents in connection with such operations as the aforesaid, or any like affairs, or any matter of property, or civil rights, or any objects of a purely local or provincial nature, in any manner or way within the said Province of Quebec; and prohibited the said company from acting as a corporation within the Province of Quebec for any of the ends or purposes aforesaid; and further condemned the company to pay the plaintiff the costs as well of the Court below as of the appeal.

Matthews, Q.C., and *Fullarton*, for the appellant, said that the three main questions were, first, whether the company was legally incorporated; secondly, whether it is entitled to hold lands in Quebec, having regard to the local law of mortmain; thirdly, whether the judgment is founded on the petition. As regards the first, see British North America Act, 1867, ss. 91, 92; *Citizens' Assurance Company* v. *Parsons* (1); a company like this could not be incorporated by any provincial legislature. As regards the second, this trading corporation would not under the old French law have come within the definition of main morte. The Civil Code of Lower Canada, arts. 364, 366, made a difference, see *The Chaudière Gold Mining Company* v. *Desbarats* (2). There are certain Building Acts of the provincial legislature which are said to be violated by this company; but it is not a building association within the meaning of those Acts. It is admitted that the appellant company may not acquire land contrary to the provisions of any local law; but it is contended that no such illegal acquisition is shewn, and if shewn would not support the prayer of the petition. As regards the third point, the declaration and prohibition pronounced by the Court are not those asked for by the petition. They are not founded on the process before the Court, and not relevant to the issues of law and fact raised by the pleadings. The provisions of the Procedure Code applicable to these proceedings shew that their validity and the jurisdiction of the Court therein depend upon and are limited by the information and the conclusions thereof; and that the issues to be tried and the proof to be adduced are similarly limited: see sects. 997, 998 (amended by Quebec Act, 35 Vict. c. 6, s. 21), 999, 1114, 1115.

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(1) 7 App. Cas. 96.

(2) Law Rep. 5 P. C. 277.

Gibbs, Q.C., and *Boddam* (*Girouard*, Q.C., of the Canadian Bar with them), for the respondent, contended that the appellant company could do all it wanted provided it obtained the consent of the local legislatures: see Civil Code, s. 358. Not having done so its acts are illegal, that is, in violation of the local laws. The company is not illegally incorporated—its powers are only incapable of being exercised at present, this can be remedied. [SIR MONTAGUE E. SMITH:—The Attorney-General was bound to lay distinct grounds; having charged illegal incorporation, can you convert that into a totally distinct charge?] Reference was made to sects. 4 and 33 of the Act under discussion. The words in the petition "without being legally incorporated or recognised" are sufficient to challenge illegality other than that of incorporation: see sect. 997 of Civil Code Procedure. [SIR BARNES PEACOCK:—The Court cannot in a proceeding like this give an injunction; it can only do one of two things under sect. 1007 and sect. 1008.] Those sections must be read with sect. 997. The object of the Act is to create a building society for provincial purposes, and those purposes cannot be effected without the aid of the provincial legislature, and in contravention of the Building Acts of the province.

The counsel for the appellants were not called upon to reply.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH :—

This is an appeal from a judgment of the Court of Queen's Bench of the Province of Quebec, reversing a judgment of the Superior Court, which dismissed the petition of the Attorney-General of the province, praying that it be declared that the appellant company had been illegally incorporated, and that it be ordered to be dissolved, and prohibited from acting as a corporation.

The judgment now appealed from did not grant the prayer of the petition, but gave other relief, in the manner to be hereafter adverted to.

The Colonial Building and Investment Association was incorporated by an Act of the Parliament of Canada (37 Vict. c. 103).

The preamble states—

"That the persons thereinafter named, 'owners of real estate in the city and district of Montreal, and elsewhere in the Dominion, have petitioned for an Act of Incorporation, to establish an association to be called the Colonial Building and Investment Association, whereby powers may be conferred on the said association for the purpose of buying, leasing, or selling landed property, buildings, and appurtenances thereof; for the purchase of building materials, to construct an improved class of villas, homesteads, cottages, and other buildings and premises, and to sell or let the same; and for the purpose of establishing a building or subscription fund, to which persons may subscribe or pay in money for investment or for building purposes, and from which payments may be made for said purposes; and also to act as an agency.'

"Sect. 1 incorporates the association.

"Sect. 4 enacts that the association shall have power to acquire and hold, by purchase, lease, or other legal title, any real estate necessary for the carrying out of its undertakings; to construct and maintain houses or other buildings; to let, sell, convey, and dispose of the said property; to acquire and use or dispose of every description of materials for building purposes; to lend money on security, by mortgage on real estate, or on Dominion or Provincial Government securities, or on the stocks of chartered banks in the Dominion; and to acquire, hold, and dispose of public securities, stocks, bonds, or debentures of any corporate bodies, and other defined securities. The clause provides that the association shall sell the property so acquired within five years from the date of the purchase thereof.

"Sect. 5 enables the association to act as an agency and trust company.

"Sect. 11 provides that the chief office of the association shall be in the city of Montreal, and that branch offices or agencies may be established in London, England, in New York, in the United States of America, and in any city or town in the Dominion of Canada, for such purposes as the directors may determine, in accordance with the Act; and that bonds, coupons, dividends, or other payments of the association may be made payable at any of the said offices or agencies."

The secretary of the association, the only witness called in support of the petition, proved that the association had bought lands, erected houses on such lands, and sold them, and had also built houses on the lands of others, and lent money on real estate. He stated that these operations had hitherto been confined to the province of Quebec, though efforts had been made to extend the business of the company to other provinces, and to establish agencies in Glasgow and New York, which had failed in consequence of the inability of the association to raise sufficient capital.

In order to understand the question which ultimately became the principal one to be considered in this appeal, viz., whether the judgment of the Court of Queen's Bench is properly founded upon the Attorney-General's petition, it is necessary to refer to the provisions of the Code of Civil Procedure of Lower Canada on which the proceedings are based, the scope and prayer of the petition, and the nature and form of the judgment appealed from.

The heading of chapter 10, sect. 1, of the Code is, "Of corporations illegally formed, or violating or exceeding their powers."

Art. 997 is as follows:—

"In the following cases,—

"(1.) Whenever any association or number of persons acts as a corporation without being legally incorporated or recognised;

"(2.) Whenever any corporation, public body, or board, violates any of the provisions of the Acts by which it is governed, or becomes liable to a forfeiture of its rights, or does or omits to do acts the doing or omission of which amounts to a surrender of its corporate rights, privileges, and franchises, or exercises any power, franchise, or privilege which does not belong to it, or is not conferred upon it by law, it is the duty of Her Majesty's Attorney-General for Lower Canada to prosecute in Her Majesty's name such violations of the law whenever he has good reason to believe that such facts can be established by proof in every case of public general interest, but he is not bound to do so in any other case unless sufficient security is given to indemnify the Government against all costs to be incurred upon such proceeding; and in such case the special information must mention the names of the person who has solicited the Attorney-General to take such legal proceedings, and of the person who has become security for costs."

Art. 998 (as amended) reads:—

"The summons for that purpose must be preceded by the presenting to the Superior Court, or to a judge, of a special information containing conclusions adapted to the nature of the contravention, and supported by an affidavit to the satisfaction of the Court or judge, and the writ of summons cannot issue upon such information without the authorization of the Court or judge."

The material allegations of the petition filed by the Attorney-General are the following:—

"That the 'Colonial Building and Investment Association' for years past have been and still are acting as a corporation in the city of Montreal, and elsewhere, in the Province of Quebec exclusively, and as such, ever since the date of its existence hereinafter mentioned, have been buying, leasing, and selling landed property, buildings, and appurtenances thereto, constructing villas, homesteads, cottages, and other buildings, and selling and letting the same, and have also been lending money on security by mortgage or hypothec on real estate in this province, the whole without being legally incorporated or recognised.

"That the operations and business of the said association have been limited to the Province of Quebec, and being, moreover, of a merely local or private nature in the said province, and having provincial objects affecting property and civil rights in the said province, the said association could not lawfully be incorporated except by or under the authority of the legislature of the Province of Quebec.

"That the said association was incorporated by the Parliament of Canada in the year 1874, 37 Vict. c. 103, and has ever since been in operation under the said Act of incorporation, which, for reasons above alleged, is null and void and of no effect, the said Act of incorporation being ultra vires.

"Wherefore your petitioner prays that a writ of summons upon the affidavit hereto annexed be ordered to issue in due course of law, and that the said defendants be adjudged and declared to have been and to be illegally formed and incorporated, and that the said illegal association may be ordered to be dissolved, and be declared dissolved, and, finally, that the defendants be prohibited from acting in future as such corporation, the whole with costs distraits to the undersigned attorneys."

The petition was verified by affidavit, as required by the Code, and thereupon an order for a writ of summons against the company was issued by a judge.

The petition also alleges that it was presented at the solicitation of John Fletcher, a shareholder of the company, who had become security for costs. It appears that Fletcher was in default in payment of his calls, but in the view their Lordships take of the case any further reference to this relator becomes immaterial.

The broad objection taken by the Attorney-General in the petition is, that the association was not legally incorporated, the statute incorporating it being ultra vires of the Parliament of the Dominion.

The judgment of the Superior Court, given by Mr. Justice Caron, distinctly overruled this objection. Mr. Justice Tessier is the only Judge of the Court of Queen's Bench who affirmed it. Chief Justice Dorion, in a judgment which received the concurrence of two other judges, acknowledged that having regard to the observations of this Board in the case of the *Citizens Insurance Company of Canada* v. *Parsons* (1), it could not be held that the incorporation of the association was beyond the powers of the Dominion Parliament, and illegal; and the majority of the Court gave judgment upon the assumption, as their Lordships understand the reasons of the judges, that the association was lawfully incorporated. The conclusion of the formal judgment of the Court is as follows:—

"That the said company, respondents, had and have no right to act as a corporation for or in respect of any of the said operations of buying, leasing, or selling of landed property, buildings, and appurtenances thereof, or the purchase of building materials to construct villas, homesteads, cottages, or other buildings and premises, or the selling or letting of the same, or the establishment of a building or subscription fund for investment or building purposes, or the acting as agents in connection with such operations as the aforesaid, or any like affairs, or any matter of property or civil rights, or any objects of a purely local or provincial nature, in any manner or way within the said Province of Quebec, and doth prohibit the said company, respondents, from acting as a corporation within the said Province of Quebec for any of the ends or the purposes aforesaid."

Mr. Justice Monk, in a short but clear judgment, dissented from his colleagues, and agreed with Mr. Justice Caron's judgment.

Their Lordships cannot doubt that the majority of the Court was right in refusing to hold that the association was not lawfully incorporated. Although the observations of this Board in the *Citizens Insurance Company of Canada* v. *Parsons* (1), referred to by the Chief Justice, put a hypothetical case by way of illustration only, and cannot be regarded as a decision on the case there supposed, their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and Provincial Legislatures in regard to the incorporation of companies.

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(1) 7 App. Cas. 96.

It is asserted in the petition, and was argued in the Courts below, and at this bar, that inasmuch as the association had confined its operations to the Province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and consequently that its incorporation belonged exclusively to the Provincial Legislature. But surely the fact that the association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the Act incorporating the association was originally within the legislative power of the Dominion Parliament. The company was incorporated with powers to carry on its business consisting of various kinds throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of Incorporation, nor warrant the judgment prayed for, viz., that the company be declared to be illegally constituted.

It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object, for the only evidence given in the case discloses no ground for suggesting fraud in obtaining the Act.

Their Lordships therefore think that the Courts in Canada were right in holding that it was not competent to them to declare, in accordance with the prayer of the petition, that the association was illegally incorporated, and ought to be dissolved.

There remains the question, which was mainly argued at the bar, whether the judgment of the Court of Queen's Bench which, shortly stated, declares that the association has no right to act as a corporation in respect of its most important operations within the Province of Quebec, and prohibiting it from so acting within the province, can be sustained.

It was not disputed by the counsel for the Attorney-General that, on the assumption that the corporation was duly constituted, the prohibition was too wide, and embraced some matters which might be lawfully done in the province, but it was urged that the operations of the company contravened the provincial law, at the least, in two respects, viz., in dealing in land, and in acting in contravention of the Building Acts of the province.

It may be granted that, by the law of Quebec, corporations cannot acquire or hold lands without the consent of the Crown. This law was recognised by this Board, and held to apply to foreign corporations in the case of the *Chaudière Gold Mining Company* v. *Desbarats* (1). It may also be assumed, for the purpose of this appeal, that the power to repeal or modify this law falls within No. 13 of sect. 92 of the British North America Act, viz., "Property and Civil Rights within the Province," and belongs exclusively to the Provincial Legislature; so that the Dominion Parliament could not confer powers on the company to override it. But the powers found in the Act of Incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have the consent of the Crown. If that consent be obtained, a corporation does not infringe the provincial law of mortmain by acquiring and holding lands. What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz., throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of Incorporation gives it capacity to do so.

It is said, however, that the company has, in fact, violated the law of the province by acquiring and holding land without having obtained the consent of the Crown. It may be so, but this is not the case made by the petition. Proceedings founded on the alleged violation by a corporation of the mortmain laws would involve an inquiry opening questions (some of which were touched

(1) Law Rep. 5 P. C. 277.

upon in the arguments at the bar) regarding the scope and effect of these laws, the fact of the Crown's consent, the nature and sufficiency of the evidence of it, the consequences of a violation of the laws, and the proper parties to take advantage of it; questions which are certainly not raised by the allegations and conclusions of this petition.

So with respect to the objections founded on the Acts of the province with regard to building societies. Chief Justice Dorion appears to be of opinion that, inasmuch as the legislature of the province had passed Acts relating to such societies, and defined and limited their operations, the Dominion Parliament was incompetent to incorporate the present association, having for one of its objects the erection of buildings throughout the Dominion. Their Lordships, at present, fail to see how the existence of these Provincial Acts, if competently passed for local objects, can interfere with the power of the Dominion Parliament to incorporate the association in question.

If the association by its operations has really infringed the Provincial Building Societies Acts, a proper remedy may doubtless be found, adapted to such a violation of the provincial law; but, as their Lordships have just observed with reference to the supposed contravention of the Mortmain Acts, that is not the case made by the petition.

It now becomes material to examine more closely than has hitherto been done the allegations and conclusions the petition really contains. The first paragraph, after stating that the corporation carried on its operations in Quebec exclusively, concludes thus: "the whole without being legally incorporated or recognised."

The second paragraph avers that the operations of the company being confined to Quebec, and being of a merely local nature, affecting property and civil rights in the province, "could not lawfully be incorporated except by the authority of the legislature of the province."

The third paragraph alleges that for these reasons, "the Act of Incorporation is null and void, the said Act of Incorporation being ultra vires."

The conclusion and prayer based on these allegations are, that the association be declared to be illegally incorporated, be declared dissolved, and prohibited from acting in future as a corporation.

It seems to their Lordships it would be a violation not only of the ordinary rules of procedure, but of fair trial, to decide this appeal upon a new case, which, assuming a lawful incorporation, rests on the supposed infringement of the laws of the province by the company in conducting its operations. This is not the wrong struck at by the petition, but a wrongdoing raising issues of a wholly different character to those to which the allegations and conclusions of the petition are alone directed and adapted. It is to be observed that the inquiries made of the company's secretary were of a general nature, and mainly directed to support the allegation in the petition that the company's operations had been limited to the Province of Quebec. No investigation of the title to any of the lands it held, nor of any particular transaction, was gone into at the hearing.

The 998th article of the Code of Civil Procedure requires that the summons to be issued "must" be preceded by a petition to the Court containing "conclusions adapted to the nature of the contravention," to be supported by an affidavit; and provides that the summons cannot be issued upon such information without the authority of a Judge. It is quite plain that the conclusions of this petition are not adapted to the case now relied on by the Attorney-General; so that neither the general principle regulating procedure nor the special requirements of the Code allow of its being set up on these proceedings.

If the company is really holding property in Quebec without having complied with the law of that province, or is otherwise violating the provincial law, there may be found proceedings applicable to such violations; though it is not for their Lordships to anticipate them, or to indicate their form.

It should be observed that their Lordships, in the case supposed in their judgment in the appeal of the Citizens Insurance Company, in regard to corporations created by the Dominion Parliament with power to hold land being subject to the law of mortmain existing in any province in which they sought to acquire it, had not in view the special law of any one province, nor the question whether the prohibition was absolute, or only in the absence of the Crown's consent. The object was merely to point out that a corporation could only exercise its powers subject to the law of the province, whatever it might be, in this respect.

It was argued that the judgment of the Court of Queen's Bench might be sustained by the part of the prayer which asked that the company " be prohibited from acting in future as a corporation within the Province of Quebec" for certain purposes. But the prohibition is asked as consequential upon the declarations prayed for, and when these are refused, there are not only no declarations, but no allegations in the petition to sustain it. It has been seen that the prohibition contained in the judgment of the Court of Queen's Bench is not an injunction limited to restraining the company from doing specified acts in violation of particular laws of the province, but is a general prohibition founded on a declaration introduced by the Court, other than those prayed for, that the company has no right to act as a corporation in dealing with lands and buildings, and certain other matters within the province. This declaration, with the prohibition founded on it, is obviously too extensive. A prohibition in these wide and sweeping terms would prohibit the company from acquiring or dealing in lands, though it had the Crown's consent, and could only be warranted by affirming the invalidity of the Act of Incorporation, which would be opposed to what has been stated in the previous part of this judgment to be their Lordships' view; or at least by affirming that the company, in exercising its powers in the province, must necessarily violate the provincial law, which, as already shewn, is not a necessary consequence.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgment under appeal, and to order that the judgment of the Superior Court be affirmed, and that the present appellant's costs of the appeal to the Court of Queen's Bench in Canada be paid by the present respondent. The appellant must also have the costs of the appeal to Her Majesty.

Solicitors for Appellants: *Simpson, Hammond, & Co.*
Solicitors for Respondent: *Wilde, Berger, & Moore.*

[PRIVY COUNCIL.]

J. C.*
1883

June 23, 26, 27; Nov. 24.

ISAIE FRECHETTE . . . . DEFENDANT;

AND

LA COMPAGNIE MANUFACTURIÈRE DE ST. HYACINTHE . . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA IN THE PROVINCE OF QUEBEC.

Civil Code of Quebec, sect. 501—*Riparian Proprietors—Servitudes—Accumulation of Flow of Water.*

By sect. 501 of the Civil Code of Quebec the proprietor of the higher land can do nothing to aggravate the servitude of the lower land.

Where the plaintiffs, being entitled to a flow of water from their land, executed certain works which had the effect of accumulating the volume of water, and probably of increasing the depth of its channel:

Held, that to the extent of such accumulation and consequent increase of flow, they had aggravated the servitude of the lower land, and to that extent had no right to demand a free course for the water sent down by them. Having insisted on their right to the existing flow, and refused to allege and prove a case for relief pro tanto, their suit was dismissed with costs.

APPEAL from a judgment of the Court of Queen's Bench (Sept. 23, 1881) affirming by a majority of four to one a judgment of the Superior Court for the district of St. Hyacinthe (Nov. 4, 1880), in favour of the respondents in an action in which the respondents were plaintiffs and the appellant was defendant.

The respondents are the owners of two plots of land situated in the city of St. Hyacinthe, on the northern bank of the river Yamaska, and of certain mills and machinery, moved by water-power, erected upon the river.

The land of the appellant is situated on the same bank of the river, below and immediately adjoining that of the respondents. The appellant also has certain mills and machinery, moved by water-power, upon the river.

The declaration, filed on the 1st of August, 1878, after setting out the title of the respondents to the two plots of land in question, commencing, as to one plot, with a conveyance dated the 10th of May, 1816, and as to the other with a conveyance dated the 7th of February, 1856, proceeded to allege that the respondents and their predecessors in title had always, by virtue of their ownership and possession of the said lands, enjoyed the full use of the water of the river Yamaska for their mills and other erections thereon; and, amongst other rights, had always enjoyed that of discharging the water, after having been utilised by them, through a channel called a tail-water channel (canal d'échappement), beyond the boundary of the property of the appellant; and that the appellant had, till shortly before the action, always recognised and acquiesced in this right. The nature of the alleged obstruction was then described, and the damage resulting, or likely to result, in consequence thereof. They accordingly claimed a declaration of their right to use the said water-power, and to discharge the water beyond the limits separating the appellant's property from that of the respondents; and that the appellant should be restrained from continuing to construct the said dam, and might be ordered to demolish the said dam, and in default that the said dam might be demolished by the officers of the Superior Court, at the expense of the appellant; and the respondents also claimed $1000 damages.

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* *Present:*—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

On the 10th of October, 1878, the respondents filed a petition asking for immediate relief by the demolition of the obstruction complained of; which stood over until the hearing of the cause, and the judgment then being in favour of the respondents, the petition was dismissed as being unnecessary.

The appellant pleaded in answer to the declaration a défense en droit, to the effect that, even assuming the truth of all the allegations in the declaration contained, the Canadian Statute of 19 & 20 Vict. c. 104 (Consolidated Statutes, c. 51), debarred the respondents from maintaining the present action, and that the only remedy of the respondents was to obtain damages in the manner provided by the said statute, by means of the appointment of experts under the conditions therein mentioned.

The appellant also pleaded three peremptory exceptions to the declaration: first, justifying the erection of the dam or dyke in question as an exercise of his lawful rights as riparian owner; and, thirdly, that the damage complained of by the respondents was not the result of any act of the appellant, but was a consequence of alterations and new works which the respondents had themselves recently executed.

The appellant further pleaded a défense spéciale en fait, justifying the obstruction in question, as necessary to prevent the damage which, as the appellant alleged, would be caused to him and his co-owners by reason of works recently executed by the respondents, which works, as the appellant alleged, had the effect of depriving the appellant of the quantity of water to which he was entitled for the purpose of working the water-wheels on his property, and rendered the dam in question necessary as a means of obtaining a sufficient supply of water. The appellant in his plea described, by reference to a plan, mentioned in the judgment of their Lordships, the works of the respondents of which he complained, and, in particular, he complained of the extension of the dyke or dam, marked No. 1 in the plan, which, as the appellant alleged, had taken place in the spring of 1878. Finally, the appellant pleaded the general issue to the whole of the respondents' declaration.

By their reply, dated the 12th of October, 1878, the respondents took issue on the appellant's défense en droit, and replied to the first peremptory exception, that they had always, previously to the erection of the dam complained of, enjoyed the free flow of the water through the said canal, and that neither the appellant nor his predecessors in title had ever interfered with their right to such flow.

The respondents put in issue all the allegations of the third peremptory exception and of the défense en fait.

At the request of both parties experts reported upon instructions given to them by the Court. The effect of the report and the facts of the case are stated in their Lordships' judgment.

The Superior Court ordered that the obstruction in question should be lowered by twenty-two inches, and awarded to the respondents $100 damages.

The Court of Queen's Bench (Dorion, C.J., Monk, Tessier and Cross, JJ., Ramsay, J., dissenting) affirmed this judgment.

It appears that there was no difference of opinion between the judges of the Court of Queen's Bench as to the questions of law raised in the case. Ramsay, J., differed from the majority of the Court in his estimate of the weight which ought under the circumstances of the case to be attached to the report of the experts on the questions of fact submitted to them. The majority of the Court considered that upon the disputed questions of fact, "la preuve produite de la part de la compagnie est plus correcte, logique et concluante," and they held that there was no reason to differ from the opinion of the experts, whose conclusions had been adopted by the Superior Court. Ramsay, J., on the other hand, considered the report of the experts to be unsatisfactory, in that it did not appear on what reasons they based their opinion, or on what evidence they had arrived at their conclusions. He therefore thought that the report should be set aside, and a fresh reference ordered to experts to report as to the effect of the dam on the water-power of the respondents, and as to the damage, if any, caused thereby.

Matthews, Q.C., and *Fullarton*, for the appellant, contended that the judgment so affirmed was wrong. The appellant had a right to do the act or acts complained of. The servitude arose out of the natural position of the property, and sect. 501 of the Civil Code of Quebec defines the relative rights of riparian proprietors; giving no right to an artificial flow of water. See also sect. 503, which deals with running streams and enacts for Canada the law of England relating thereto. No title to the servitude was proved within the meaning of sects. 549–551 of the Civil Code, which treats of servitudes established by the agency of man. Title by prescription does not exist in the Canadian law of servitudes, there must be a grant or an act of recognition. The evidence shews no damage to such flow of the water as the respondents had established a right to. The only recognition proved was of such minor modification of the original flow as was made in 1878, and did not extend to the flow which was increased by later works of the respondents, and by the accumulation then effected. Chapter 51 of the Consolidated Statutes of Lower Canada, sects. 1–4, authorized what was done by both parties. It is a consolidation of 19 & 20 Vict. c. 104. It alters the position of riparian proprietors, and makes their rights different from those in any other country. Under that Act the respondents are protected in doing acts prejudicial to others, and acquire no right to restrain others from doing the like, but each is limited to compensation under the statute. The appellant had thereunder the right to do the act complained of, subject to no remedy but compensation under the statute. On the other hand, if that Act is held not to apply, then no legal title to the accumulated flow was shewn, nor was possession proved for a year and a day—possession annale. Again, this action is en dénonciation de nouvel œuvre, and will not lie after the completion of the work complained of: see *Brown* v. *Gugy* (1). Further it is a possessory action on disturbance, and for repossession within the meaning of sect. 946 of the Code of Procedure, and it is joined with the petitory claim founded on title contrary to sect. 948. It is misjoinder to ask for declaration of right and damages at the same time, and the misjoinder requires that the action should be dismissed: see Bourjon, Droit Commun de la France et Coutume de Paris, tit. 4, Des Actions Réelles, sect. 4, art. 28, 29. [*Digby* refers to art. 120, sub-sect. 6 of C. P. C.] The possessory action moreover will not lie unless possession annale is shewn—not mere possession, precarious in its nature, but possession in virtue of legal proprietorship: sect. 2192 of C. C. A possessory action does not lie except in respect of a right acquired by prescription, see Bourjon, Coutume de Paris, vol. ii., book v., title 4, sect. 3; Coutume de Paris, sect. 186, Code Napoléon, arts. 690, 691. The Canadian Code does not make any direct provision for this: see, however, Touillier, Droit Civil Français, vol. iii., p. 549, par. 717.

LORD WATSON:—Their Lordships will hear the respondents upon two points, first, as to the effect of the statute c. 51 of the Consolidated Statutes of Lower Canada; second, as to the bearing of the fact that the river is not in its natural state, and that artificially its condition is different from what it was immediately after the works of 1878.

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(1) 2 Moore, (N.S.) P. C. 341, 361.

Bompas, Q.C., and *Kenelm Digby*, for the respondents, contended that the Act referred to did not take away the right which the respondents would otherwise have to maintain the present action, either under the common law or under the law in force after the passing of the Code. The statute may perhaps be accounted for as intended to be an assertion of the rights of riparian owners against any exclusive rights to water which might have been supposed to devolve on the Crown upon the abolition of the seignorial privileges. However this may be, under the statute there cannot be interference with an existing water business and machinery. For thirty years opinion upon this statute has been that it did not empower the owner of a new mill to interfere with the water power of an old mill. It is too late to put a new interpretation on the Act unless it is absolutely necessary to do so. This Act was intended to operate against landowners, but not against millowners, or those who had already turned running waters to practical use. It could have no application to a place like the present, where, by its charter of incorporation, there is no "warden" to carry out its provisions, nor was it shewn that the work in question fulfilled the condition imposed by the statute. At all events, whatever may have been the effect of the statute before the Civil Code, the law must now be looked for exclusively in the Code, and the general principle is found in article 501. This article is inconsistent with the construction of the statute contended for by the appellant, and the statute is therefore repealed by the Code. See art. 2613. The reference to the statute in art. 503 cannot have the effect of nullifying the principles laid down in art. 501.

With regard to the second point this was part of the original bed of the river, and no obstruction placed in the natural bed of the river could be justified: *Bickett* v. *Morris* (1). If we have wrongfully altered the flow, the remedy is not by raising a new obstruction, but by complaining of the wrongful

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(1) Law Rep. 1 H. L., Sc. 47.

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act: *Tapling* v. *Jones* (1). The Code Napoléon and the later French authors say that you must not throw on your neighbour's land more water than would naturally flow there; but you may for the purpose of working mills or irrigating lands alter the flow of water to a reasonable extent. The French authors say that it is a question of degree how much alteration may be legally made, and that the Courts must exercise their discretion: Dalloz, tit. "Servitude," c. iv. sect. 1, vol. xl. p. 79, pars. 77–82. The respondents have put up a dyke, and as long as they leave it in the same position, the fact that the amount of water is altered by the seasons does not affect it. Extending their Dyke No. 1 was not to give their mill more water, but in dry seasons to give the required amount. The old Dyke No. 1 was theirs by right, and all they did was to arrange that they should have for a large part of the dry season the required amount of water.

Fullarton, replied, citing *Embrey* v. *Owen* (2); *Gadioux St. Louis* v. *Gadioux St. Louis* (3); *Dickinson* v. *Grand Junction Canal Company* (4); *Daviel's* Traité des Cours d'Eau, cited by Lord Kingsdown in *Brown* v. *Gugy* (5).

The judgment of their Lordships was delivered by—

SIR ARTHUR HOBHOUSE:—

The parties to this suit are owners of contiguous lands on the left bank of the river Yamaska; the plaintiffs, who are the respondents, being the owners of the upper lands, and the defendants, one of whom is the appellant, of the lower. The complaint is that the defendants have lately erected a barrier which prevents the water flowing in due course from off the land of the plaintiffs.

To understand the position of affairs it is convenient to refer to a plan put in by the defendants. Prior to the year 1878 matters stood as follows:—The whole river was traversed by a dyke marked A, which conducted the water to a mill (No. 4)

(1) 11 H. L. C. 290.
(2) 6 Ex. 353.
(3) 3 Moore, P. C. 398.
(4) 7 Ex. 282.
(5) 2 Moore, P. C. (N.S.) 361

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belonging to the plaintiffs. After working that mill the water escaped into the natural channel of the river, and was not diverted again by the plaintiffs until nearly 100 yards below Mill No. 4, where it reached the head of another dyke (Dyke No. 1), which was built near and nearly parallel to the left bank, and which caught a portion of the stream and carried it to another mill (Mill No. 1) belonging to the plaintiffs. The rest of the stream was caught by a dyke (Dyke No. 3), the head of which was in mid-channel opposite Mill No. 4, and which conducted the water to the defendants' Mill No. 3. The water escaping through the tail race of Mill No. 1 also descended to Mill No. 3, but how it was used there, if used at all, does not clearly appear. Early in the year 1878 the plaintiffs carried Dyke No. 1 up the river to a point above the head of Dyke No. 3, and there connected it with a reef of shingle which extends to the right bank of the river. By this work the whole stream has been intercepted below Mill No. 4 and conducted to Mill No. 1, except where there is water enough to overflow the reef of shingle, and except so much as may leak through the dyke or through the reef. The defendant says that water has thus been taken away from the watercourse formed by Dyke No. 3; and in the month of June, 1878, for the purpose, as he alleges, of recouping himself, he erected a barrier so as to prevent the escape of water from the tail race of Mill No. 1, and to form a head of water for a new mill which he built just below No. 3. The plaintiffs have also built a new mill (Mill No. 2) just below No. 1, and have excavated the bed of the river to receive their new wheels.

There has been considerable controversy whether the defendants' operations have impeded the working of Mill No. 1 or only that of Mill No. 2, but, in their Lordships' opinion, the controversy is not now material. The important fact is that the defendants' barrier has been found to bay back the water to a maximum depth of twenty-two inches at point A, which is the dividing line of the two properties. And the important question is, whether the plaintiffs are entitled to have the barrier so lowered that the water shall not be bayed back to any extent at all at Point A.

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By the Civil Code of Quebec all rights to flowing water are classed under the head of servitudes; and by sect. 500 real servitudes are divided into three classes, according as they arise from the natural position of the property, from the law, or from the act of man. Servitudes arising from the law have nothing to do with the present question.

Sect. 501, which deals with servitudes of the first class, is as follows:—"Lands on a lower level are subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man. The proprietor of the lower land cannot raise any dam to prevent this flow. The proprietor of the higher land can do nothing to aggravate the servitude of the lower land."

Sect. 503 applies specially to rivers. It says, "He whose land borders on a running stream may make use of it as it passes for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs, saving the provisions contained in chapter 51 of the Consolidated Statutes for Lower Canada, or other special enactments." "The same right" their Lordships take to mean the right to make use of the running stream as it passes the bordering land.

Unless then the provisions of the Code are limited by some special enactment, the plaintiffs have a right to say that the flow of water from their land shall not be impeded, so far as it is a natural flow, and independent of the agency of man. In this case the natural flow of the river has been altered by the agency of man for a long time, but an artificial flow may acquire as ample a right to protection as a natural flow.

The 3rd chapter of the 4th title of the Code treats of servitudes established by the act of man. Sect. 545 recognises the right of every proprietor to subject his property to such servitudes as he may think proper consistently with public order. Sects. 549 and 550 are as follows:—

"No servitude can be established without a title; possession even immemorial is insufficient for that purpose."

"The want of a title creating the servitude can only be supplied by an act of recognition proceeding from the proprietor of the land subject thereto."

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"Title," which answers to "titre," means a written or express grant.

Now as regards the flow of water which existed prior to 1878, and which it may be convenient to call the established flow, it is not now disputed but that the plaintiffs became and were just before the execution of their new works rightfully possessed (whether by title or by some act of recognition does not clearly appear) of what, according to the Code, is a servitude over the defendants' property. Their Lordships consider that the plaintiffs then had, at least as between them and the defendants, the same right to protection for the established flow as if it were the natural flow. The defendants might not raise any dam to obstruct the established flow.

The appellant's counsel contended strongly at the bar that the working of the plaintiffs has not been impeded or only impeded to a slight extent, and that the defendants have been materially injured by the abstraction of water. But their Lordships did not think it necessary to hear the respondents' counsel on those points. For the right to resist interference with a natural flow of water, or a flow legally established, is independent of the actual user of the water. Neither would the plaintiffs' right to have the established flow protected be barred by the mere fact that the defendants may have been injured by deprivation of water owing to the extension of Dyke No. 1. That might give the defendants a right to sue for damages, or to remove the dyke; but it does not follow that they can interfere with the established flow from the plaintiffs' land.

The appellant's counsel also insisted strongly that the action is wrong in form, but their Lordships see no reason to differ from the two Quebec Courts on this point.

The question whether chapter fifty-one of the Consolidated Statutes does not confine the plaintiffs to a single remedy, viz., that of pecuniary damages, is a more substantial one. There is certainly great difficulty in so construing the Code and the statute as to produce a clear and harmonious result for the whole. There is nothing on the face of the statute itself to limit the generality of the powers it appears to confer on riparian owners.

It was stated at the bar that there had been a course of decision in Canada which had the effect of placing a limit on the general terms of the statute. But the only case cited, that which is stated in the respondent's factum filed the 11th of May, 1881, appears only to refer to the mode of ascertaining damages. And the judges in the lower Courts do not refer to any course of decision, while they entertain a great diversity of view as to the limits within which the statute is to be construed. The Superior Court appears to think that the statute is no answer to actions founded on common right and on actual injury. Mr. Justice Ramsay, while impugning both the motives and the capacity of its framers, thinks it means nothing more than that if and when damages are sued for they shall be ascertained by referees. The rest of the Court in one passage express an opinion that the statute was not intended to operate against those who had turned running waters to use, and in another, that it was intended to operate only against landowners and not against millowners. It is difficult to find the foundation for any of these limitations. At the same time, their Lordships find it difficult to suppose that by the saving of the statute contained in sect. 503, the Code intended to give no remedy whatever beyond pecuniary compensation for any violation of its rules. The question was very ably argued at the bar, but in the result their Lordships do not find it necessary to pronounce any opinion on it.

The substantial difficulty in the way of the plaintiffs is this: that they are seeking to establish a new and different servitude by the act of man without either grant or recognition; that they have not alleged or proved what was the precise servitude which existed prior to 1878; and that the decree which they have obtained proceeds on the assumption that the existing state of things is the natural state, or at least that there is identity between the state of things before and after the plaintiffs' operations of 1878. This is the difficulty to which the attention of their counsel was specially called, and to see how it stands it is necessary to examine the proceedings with some particularity.

In the declaration filed by the plaintiffs, they set forth their documents of title, and allege that they have had for upwards of sixty-two years the rights, privileges, and water-powers actually used by them. They pray for a declaration of those rights, for a declaration that the defendants have illegally disturbed the enjoyment of them, and for demolition of the defendants' barrier. It is clear then that, so far, the plaintiffs make no distinction between the existing flow of water and the established flow.

The defendants on their part rely on the alterations of 1878. They say in substance that the mischief is caused by the plaintiffs' own works executed below Mill No. 1 in the preceding spring and summer; that the extension of Dyke No. 1 has caught all the water and carried it down to Mill No. 1; that by collecting so large a quantity of water into the narrow space on the left bank, the plaintiffs have themselves to blame if at that point the water is more abundant than they like; and that they have no grant (titre) giving them a right so to use the river.

In replying to these defences the plaintiffs do not fall back on their right to the natural or the established flow of the water. As regards their works below Mill No. 1, they say that the defendants' allegations are false in fact. And as to all their recent operations, they say that their only object has been to preserve the water and conduct it from one of their mills to another, as they have always done.

At the wish of both parties experts were appointed by the Court to report upon instructions given to them by the Court. They were to state,—

1. The condition of the localities and of the erections described in the writings of the parties, both before and after the said erections.
2. The works of the defendants.
3. The nature of those works, and whether they are calculated to injure the working of the water-power used by the plaintiffs before they were completed.
4. What should be done so that each party may use the water without injury to the other.
5. What amount of damages, if any, should be paid by the defendants to the plaintiffs.

These instructions are not pointed to the effect of the plaintiffs' operations, but rather indicate that the only question is whether the flow existing at the time of the defendants' operations has been impeded.

In answer to the first and second questions the experts shew the construction of the old and new mills to the effect hereinbefore stated, but they say nothing about the extension of Dyke No. 1, nor do they shew what was the former flow of the water, or the bed of the river, or in any other respect what was the state of the localities prior to the execution of the recent works of the plaintiffs. In answer to the third question they find that the defendants' new barrier bays back the water to the depth of about two feet at the boundary line, point A. In answer to the fourth question they find that the defendants ought to lower their barrier by twenty-two inches, so as not to bay back the water at all over point A. And they award $100 for damage.

The parties then went into evidence, and the cause came on for hearing before Mr. Justice Sicotte, Judge of the Superior Court. That learned judge gave the plaintiffs a decree in precise accordance with the opinion of the experts. The decree is founded on recitals shewing that the plaintiffs have been in possession of a real right for a year and a day, using the upper waters and letting them escape over the land of the defendants. Then it states that the barrier raised by the defendants has obstructed the waters in their natural course such as it was formerly.

It is clear then that the Superior Court paid no attention to the alteration effected by the plaintiffs' works in 1878. The recital of possession for a year and a day is true of the prior state of things, but is not true of the existing state of things. Nor is the present course of the water its natural course, nor such as it was formerly.

On appeal to the Queen's Bench, there was a difference of opinion among the judges. Mr. Justice Ramsay states very clearly the point of the defence which is now under discussion. He says, "The defendants answer that they have not stopped the natural flow of the water, but that the plaintiff has, by increasing his own works above, directed the waters of the river out of their natural course, and so created an artificial accumulation of water which can only escape through the tail race." He thinks this would be a good defence if it were not for the acquiescence or recognition of the defendants. But there is no evidence of such acquiescence in the plaintiffs' works of 1878. The evidence referred to by Mr. Justice Ramsay consists of two acts. First, the construction by the defendants of Dyke No. 3, which was long prior to the extension of Dyke No. 1. Secondly, the construction of the works now complained of. But in the first place, though it is true that by their new works the defendants sought to take advantage of the new flow of water, they did so because their former flow was partially cut off. And in the second place an act can hardly be treated as acquiescence in favour of a person who has ever since been contending against it, and striving to destroy it. It is at the utmost acquiescence on condition of enjoying the thing acquiesced in, and if that condition is taken away, so is the acquiescence.

Having thus disposed of the defence founded on the extension of Dyke No. 1, Mr. Justice Ramsay addresses himself to the question of damage. He thinks that there is no sufficient evidence of damage, and would either dismiss the action or remit it for further report by experts.

The opinion of the rest of the Court was delivered by Mr. Justice Tessier. That learned judge states the defendants' plea that the plaintiffs themselves have caused the mischief complained of, but he thinks it completely answered by the report of the experts in answer to the third question. Now that question and answer relate only to the existing flow of water, and have absolutely no bearing on the prior question whether the plaintiffs are entitled to have that flow protected. Mr. Justice Tessier then quotes art. 501 of the Code, and says that the company have not added anything to the volume of the water by the hand of man, because they have not introduced any foreign water into the Yamaska. On these grounds the Court decides for the plaintiffs, and dismisses the appeal.

It is true, indeed, that the plaintiffs have not increased the whole volume of the Yamaska, but they may have accumulated the waters of that river into a small space, and so have increased their depth at the point where they complain of it, and have augmented the servitude they desire to enforce. This is the very thing which the Court of Queen's Bench appear to think would be material if only it had been done by introducing fresh water into the Yamaska, instead of being done by a readjustment of the waters of the Yamaska itself. That it must have been done to some extent seems evident from the plan, and the respondents' counsel so admitted. It results also from the evidence given by Bertrand and by Delisle, shewing how the water which used to flow to the right of Dyke No. 1 now flows to the left. The plaintiffs have left the point untouched by evidence. Whether the difference is much or little has not not been ascertained. By sect. 501 of the Code, the proprietor of the higher land can do nothing to aggravate the servitude of the lower land. The plaintiffs have certainly accumulated the volume of the water, and have probably increased its depth in the narrow channel up to the dividing line. To that extent they are aggravating the servitude of the lower land, and to that extent at least they have no right to demand, as they do demand, a free course for the water sent down by them. That the matter is left in this uncertainty is the fault of the plaintiffs, who are bound to allege and prove a case entitling them to relief. They come into Court insisting on their right to keep unobstructed the flow of water which they say has existed as it now is for more than sixty years. The issue is distinctly raised that the existing flow is not the ancient one; but they continue to insist that it is, and refuse to shape their case so as to try the question whether or no they are really entitled to some relief on the ground that the established flow had been interfered with, and to get that amount of relief. It is unsatisfactory to dispose of a case on such grounds, but their Lordships cannot see by what right the defendants are to be compelled to keep their dam so low that the whole volume of water, as accumulated and increased by the plaintiffs, shall run away unobstructed.

It is not easy to find decisions precisely applicable to such peculiar circumstances; but their Lordships have not been referred to and are not aware of any case in which the plaintiff has obtained relief in respect of any servitude except that to which he has clearly alleged and proved his right.

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In *Saunders* v. *Newman* (1) the plaintiff had acquired a prescriptive right to an artificial flow of water. All he had done within recent times was to alter the construction of the wheel turned by the water. It was held that the defendant, a lower proprietor, had no right to obstruct the ancient flow; but it seems clear from the observations of the judges that the decision would have been otherwise if the plaintiff's operations had substantially altered the flow of the water. Abbott, J., says, "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill. If he was, that would stop all improvements in machinery. If indeed the alterations made from time to time prejudice the right of the lower mill, the case would be different; but here the alteration is by no means injurious, for the old wheel drew more water than the new one."

Tapling v. *Jones* (2) was cited as an authority for the plaintiffs; but so far as it bears upon the point under discussion it favours the argument for the defendants. For the plaintiff in *Tapling* v. *Jones* succeeded in getting protection for nothing but his ancient light; those very rays of light to which he had acquired an indefeasible right. Lord Westbury says:—"In the present case an ancient window in the plaintiff's house has been preserved, and remained unaltered during all the alterations of the holding. . . . . The appellant's wall, so far as it obstructed the access of right to the respondent's ancient unaltered window, was an illegal obstruction." And Lord Chelmsford, in answering the argument that the alteration of windows had changed the character of the right so as to destroy it, says, "But it is not easy to çomprehend how this effect can be produced by acts wholly unconnected with an ancient window which the owner has carefully retained in its original state."

It may be inferred from these judgments that if the plaintiff in *Tapling* v. *Jones* (2) had so mixed up his old lights with his new

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(1) 1 B. & A. 258.

(2) 11 H. L. C. 290.

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ones that they could not be distinguished he would have failed. It is true that in that case the protection given to the ancient light carried with it incidentally protection to the new lights. But the only reason why it did so was that the new lights could not be obstructed without obstruction to the ancient light. New lights are no encroachment, nor did the plaintiff's decree aggravate the defendant's servitude, for he was only prevented from building so as to obstruct the ancient lights. In the case of an augmented flow of water the servitude of the lower proprietor is aggravated.

The result is that the plaintiffs have insisted on an enjoyment to which they have shewn no legal title, and have not proved or even alleged any case for relief in respect of that enjoyment to which they may have had a title. Their Lordships have anxiously considered whether it is possible usefully to remit the case to be tried on the true issues. They are however convinced that an attempt to do so will not save time or money, and that the litigation must follow the strict course. They will humbly advise Her Majesty to reverse the decrees below, and to dismiss the action with costs. The costs of this appeal will follow the result.

Solicitors for appellant: *Simpson, Hammond, Richards & Simpson.*

Solicitor for respondents: *R. H. Wilkins.*

[HOUSE OF LORDS.]

H. L. (E.)
1884
Feb. 18.

WILLIAM SMITH . . . . . APPELLANT;

AND

DAVID CHADWICK, JOHN OLDFIELD CHADWICK, EBENEZER ADAMSON, AND EDWIN COLLIER . . . RESPONDENTS.

Action of Deceit—Fraudulent Misrepresentation ambiguous in Meaning—Burden of Proof on Plaintiff.

The prospectus of a company which was being formed to take over iron-works, contained a statement that "the present value of the turnover or output of the entire works is over £1,000,000 sterling per annum."

If that statement meant that the works had actually in one year turned out produce worth at present prices more than a million, or at that rate per year, it was untrue. If it meant only that the works were capable of turning out that amount of produce it was true.

In an action of deceit for fraudulent misrepresentation whereby the plaintiff was induced to take shares he swore in answer to interrogatories that he "understood the meaning" of the statement "to be that which the words obviously conveyed," and at the trial was not asked either in examination or cross-examination what interpretation he had put upon the words:—

Held, by the EARL OF SELBORNE L.C. and LORDS BLACKBURN and WATSON, affirming the decision of the Court of Appeal, that the statement taken in connection with the context was ambiguous and capable of the two meanings; that it lay on the plaintiff to prove that he had interpreted the words in the sense in which they were false and had in fact been deceived by them into taking the shares, and that as he had as a matter of fact failed to prove this the action could not be maintained.

Held, by LORD BRAMWELL, that the statement was capable only of the meaning in which it was untrue, and that the plaintiff had proved that he had understood it in that sense; but that there was not sufficient evidence that the statement was fraudulent on the part of the defendants, and that the decision of the Court of Appeal should be affirmed on that ground.

APPEAL by the plaintiff from two orders of the Court of Appeal (Jessel M.R. Cotton and Lindley L.JJ.) reversing an order of Fry J. in favour of the plaintiff. All the facts are set out at length in the report of the decisions below (1). The facts material to this report are stated in the judgment of Lord Blackburn in this House. All the questions argued below were mentioned by the appellant's counsel on the present appeal, but the only one seriously insisted on was that arising upon the representation as to the turnover or output, and the arguments on the other points are therefore omitted.

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(1) 20 Ch. D. 27.

1883. Nov. 15, 16, 21. *Romer* Q.C. and *Cozens-Hardy* Q.C. (*Chadwyck-Healey* with them) for the appellant:—

The decision of Fry J. was right and the representation as to the turnover or output would to ordinary men of business mean that the works had actually produced the amount stated, and it was so understood by the plaintiff who took shares on the faith of it. That the statement might have another and less natural meaning does not exonerate the defendants. The burden lay on them to shew that the meaning was what they alleged it was. The defendant's counsel should have asked the plaintiff in cross-examination what meaning he put upon the representation. It would not have been admissible for the plaintiff's counsel to ask him that question in examination in chief. The person who makes a false representation in order to induce another to act upon it to his injury makes a primâ facie case against himself that the misrepresentation is material; and the presumption is that the person to whom the representation was made and who acted upon it was in fact deceived by the representation. The man who makes a false representation, even honestly, is liable if the other acts upon it: *Redgrave* v. *Hurd* (1) per Jessel M.R.; *Mathias* v. *Yetts* (2). It is not necessary to shew that the representation is false to the knowledge of the defendant if he makes it without knowing whether it is true or not; *Arkwright* v. *Newbold* (3) per Cotton L.J.; *Western Bank of Scotland* v. *Addie* (4). The questions for the House are questions of fact; in what sense did the plaintiff understand the prospectus? and was he in fact deceived? The conclusion of Fry J. who saw and heard the witnesses is the most likely to be right.

(1) 20 Ch. D. 1, 12, 21.
(2) 46 L. T. (N.S.) 497, 502.
(3) 17 Ch. D. 320.
(4) Law Rep. 1 H. L. Sc. 145.

Nov. 22, 23. *R. T. Reid* Q.C. (Sir *H. Giffard* Q.C. with him) for the respondent Adamson, and *Horace Davey* Q.C. (*Russell Roberts* with him) for the other respondents:—

The representation as to the output meant not that the works had produced but that they were capable of producing such a turnover or output: but if not then it was ambiguous, as is manifest from the different interpretations put upon it by the judges below. If the representation be capable of two senses the plaintiff must shew in which sense he understood it, and that it was false in that sense: *Hallows* v. *Fernie* (1) per Lord Chelmsford; *Arkwright* v. *Newbold.* (2) The plaintiff nowhere, in pleadings or evidence, alleges in what sense he understood it. He must also shew that the defendants knew that that sense was false; or made the statement without knowing whether it was true or not. Legal fraud is not actionable without moral fraud: *Weir* v. *Bell* (3) per Bramwell L.J.; though there are some equity dicta to the contrary: *Eaglesfield* v. *Marquis of Londonderry* (4); *Slim* v. *Croucher* (5). Probably the difference has arisen from the equity actions being usually for rescission of contract, where moral fraud need not be proved.

[LORD BLACKBURN:—I have often thought that perhaps the discrepancies between expressions of equity and common law judges are greatly owing to the fact that at common law questions of fact are for the jury and it is necessary for the judge to separate them clearly from the questions of law; whereas in equity the judges have to determine both law and fact, and it is sometimes impossible to understand whether their decisions were meant to be inferences of fact or of law.]

As to the respondent Adamson Jessel M.R. was in error in supposing that he penned the circular.

Romer Q.C. replied.

The House took time for consideration.

(1) Law Rep. 3 Eq. 520; 3 Ch. 467, 478.

(2) 17 Ch. D. 301, 324.

(3) 3 Ex. D. 238, 243.

(4) 4 Ch. D. 693, 706.

(5) 1 D. F. & J. 518, 524.

1884. Feb. 18. EARL OF SELBORNE L.C.:—

My Lords, I conceive that in an action of deceit, like the present, it is the duty of the plaintiff to establish two things; first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts: and, secondly, he must establish that this fraud was an inducing cause to the contract; for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct.

All your Lordships are, I believe, agreed in thinking that, of the several representations in this prospectus, by which the appellant alleges himself to have been deceived, only one is material, viz., that as to "the present value of the turnover or output of the entire works" (stated as being "over £1,000,000 sterling per annum"). Of the materiality of that representation there can be no doubt; and if the appellant was justified in understanding, and did understand it, in the sense insisted upon by his counsel at the bar, it was untrue as well as material. If, in the context in which it stands, it could not be honestly intended or reasonably understood in any other sense, I should think that the appellant's case was made out, although he has contented himself with swearing, in his answer to the defendants' interrogatories, that he understood the meaning of the words to be "that which they obviously convey," and has professed to be "unable to express in other words what he understood to be the meaning thereof." If, for instance, the material statement had been that Mr. Grieve was a director, I should have thought such an answer quite sufficient. But it is otherwise, in my opinion, if the words in the context in which they stand may have been honestly intended to bear another sense (in which they would be true), and might reasonably have been so understood by an intelligent man of business, aware of the current prices at that time of bar and plate iron; and if at the time when that answer was given, the appellant had notice that the defendants, who made the representation, did in fact allege such other sense to be the true one, and the sense which they intended.

The sentence is, beyond question, unhappily expressed; and I think its more natural primâ facie meaning is that which takes the verb "is" literally, as affirming a present fact, and the words "the present value of the turnover or output" as equivalent to "the present value of the present turnover or output." I cannot however consider the words, in the context in which they stand, to be clear or unambiguous. In any point of view I do not think that they sufficiently explain themselves. Some reference, at least, to current prices as a basis of valuation must be implied in them. Even on the appellant's construction, "the turnover or output" is a term requiring some further definition. Does it mean the rate of production then actually going on, if extended over a whole year; or the total production of the past twelve months, estimated at the then present prices; or the actual yearly production on a series or an average of years? If the demonstrative article "this" had preceded the words "turnover or output" (instead of the definite article "the") the sense would clearly be that which the defendants say they intended. After repeatedly considering the words in connection with their context and with the evidence, I think the soundest conclusion is that this sentence was honestly intended to be understood as a statement of the value, at the then current prices, of *that* "turnover or output" of which the works were in the immediately preceding context stated to be "capable;" and that, to an intelligent man of business, who knew what those current prices actually were, and who took the trouble of comparing them with the figures given, they would really convey that meaning. The appellant was an intelligent man of business; and it does not appear to me to be a hypothesis inconsistent with anything to which he has sworn, that he may have had the requisite knowledge, and may have made use of it, and may have himself understood the representation in this sense, and have intended (in that sense) to challenge its truth. He did expressly challenge the truth of part of the representation, in the antecedent context, as to the capacity of the works. That the defendants would offer that explanation of it, he had (to my mind) clear notice, by their answers to his own interrogatories, sworn or filed on the 12th of June, 1877. Having such notice, and afterwards answering the defendants' interrogatories in the way that he did, and not attempting in any other way to prove that he was deceived by the representation, I cannot think that he has satisfied the burden of proof which, under those circumstances, was incumbent upon him. The Court of Appeal have so decided; I cannot say that they were wrong. It ought not to be forgotten that the appellant has sworn in precisely the same way as to *all* the representations which in his pleadings he alleges to be false; as to some of which your Lordships do not accept his construction, and as to others of which it is certain that he was not deceived by, and did not rely on them.

I do not think it necessary to add more; because I agree generally with the view of this case which I know will be explained to your Lordships, in greater detail, by one of my noble and learned friends (Lord Blackburn). My conclusion is, that the appeal ought to be dismissed, with costs.

LORD BLACKBURN:—

My Lords, in this case Fry J., who tried the action, gave judgment for the plaintiff, and ordered and adjudged that the plaintiff should recover £5000 by way of damages, and that the defendants David Chadwick, John Oldfield Chadwick, Ebenezer Adamson, and Edwin Collier should pay the same.

The defendants David and J. O. Chadwick and Edwin Collier appealed, and the defendant Adamson separately appealed. In each case the Court of Appeal, consisting of the late Master of the Rolls (Sir George Jessel) and Cotton and Lindley L.JJ., made an order reversing the judgment and dismissing the action with costs. The appeal to your Lordships is against those two orders.

It is not contended that there is any room for a distinction between the cases. If the order reversing the judgment against one set of defendants is right, the order to reverse the judgment against the other is also right.

The action is brought in the Chancery Division, the indorsement on the writ being that "the plaintiff's claim is for damages sustained by him, by his having been induced to take and pay for shares in the Blochairn Iron Company (Limited) by the fraudulent misrepresentations of the defendants." The statement of claim does not depart at all from this, though stating it at more length.

I agree in what is said by Cotton L.J. in *Arkwright* v. *Newbold* (1): "An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the Common Law Divisions; there being, in my opinion, no such thing as an equitable action for deceit." But though this is, I think, quite accurate, the different mode in which cases are tried makes, I think, a difference in the province of a Court of Appeal, which I wish to notice, for, in the view I take of this case, it is important. Had this action been brought on the old system before a judge and a jury, and the same evidence given as has been given here, the judge would have had to direct the jury, pointing out to them what it was necessary for the plaintiff to prove in order to support his case, and what evidence there was from which an inference of facts sufficient to support the plaintiff's case might be drawn, leaving it to the jury, with proper comment, to draw or to refuse to draw that inference. And if the jury had found for the plaintiff, on a proper application on behalf of the defendant, a Court of Appeal could have inquired whether the proper direction was given, and, if it was, whether the verdict drawing the inference was so unsatisfactory that a new trial should be granted and the opinion of another jury taken. But the Court of Appeal, however strongly convinced that the jury drew the wrong inference, could not find the verdict for the defendant.

Now when the case is, as it was here, tried before a judge both of law and of fact, he draws the inference of fact. If he finds in favour of the defendant, it may be because he thinks the evidence such that, as a matter of law, no inference of what was necessary to support the plaintiff's case could properly be drawn from the evidence before him, or it may be because, though he thinks such an inference might be drawn, he does not, as a matter of fact, draw it. The result would be the same. If he finds in favour of the plaintiff, it must be because he not only thinks that an inference might be drawn from the evidence, but that he does draw it.

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(1) 17 Ch. D. 320.

The Court of Appeal ought to give great weight, but not undue weight, to the opinion of the judge who tried the cause, and saw the witnesses and their demeanour. That gives him considerable advantages over those who only draw their information from perusing the notes. But still, though the Court of Appeal ought not lightly to find against the opinion of the judge who tried the cause, I think that the Court of Appeal, if convinced that the inference in favour of the plaintiff ought not to have been drawn from the evidence, should find the verdict the other way.

In the present case I think there were four statements by the defendants, alleged to be fraudulent and to have induced the plaintiff to buy the shares, on which the finding of the judge below in favour of the plaintiff was based. Two were disposed of in the course of the argument. Two remain. One, that which stated that Mr. Grieve was a director, was, I think, proved to be untrue to the knowledge of the defendants when they made it, and any one who took shares, induced by the belief that Mr. Grieve would not lend his name to a company without ascertaining that it was a solid one, would, I think, be entitled to maintain an action of deceit. I can very well believe that there might be persons in Greenock or elsewhere who would be influenced by his name to that extent. But the plaintiff in his evidence on cross-examination says that he had never heard of Mr. Grieve before, and (Appendix p. 95) on the counsel saying, "Then I suppose seeing Mr. Grieve's name on the prospectus had not much effect on you," he said nothing, but we are informed that he shook his head. I suppose that the shorthand writer whose eyes would be naturally fixed on his pen did not see this shake of the head. He certainly has not written down that there was such a shake; but it is plain that the cross-examining counsel was satisfied with this mute answer; and on re-examination nothing is said more about Mr. Grieve. I certainly think it proved that the plaintiff was not induced to take the shares by this deceit. And I believe all your Lordships agree so far. But there is a much more difficult question behind, depending upon the confused statement as to the turnover and output, which I would examine more in detail afterwards.

I have come to the conclusion that whatever be the meaning of that statement the plaintiff has *not* sufficiently proved that it did influence him. I do not say that there is no evidence on which a verdict for the plaintiff might be found. I certainly think that, if trying this cause with a jury, I should not be justified in withdrawing it from the jury. I do not even say that a verdict for the plaintiff if found by a jury would be so unsatisfactory that there should be a new trial. But I should have accompanied my direction to the jury with the same observations which I shall hereafter submit to your Lordships as justifying the conclusion to which the Court of Appeal have come and to which I myself come, and to which I ask your Lordships to come; and I think that the jury would, on hearing them, have probably found for the defendants.

Before going further I wish to make some observations; for though I very nearly agree in what is said by the late Master of the Rolls (1), he does not quite state what I conceive to be the law. I do not mean to go through the numerous decisions on the subject of an action of deceit. All those which were decided before the date of the last edition of Smith's Leading Cases are to be found collected in the notes to *Chandelor* v. *Lopus* (2) and *Pasley* v. *Freeman* (3).

In *Pasley* v. *Freeman* (3) Buller J. says: "The foundation of this action is fraud and deceit in the defendant and damage to the plaintiffs. And the question is whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies, per Croke J. (4)."

Whatever difficulties there may be as to defining what is fraud and deceit, I think no one will venture to dispute that the plaintiff cannot recover unless he proves damage. In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon these representations, he shews damage; if he did not, he shews none. And I think the plaintiff in such a case must not only allege but prove this damage. It is as to what is sufficient proof of this damage that I wish to make my remarks. I do not think it is necessary, in order to prove this, that the plaintiff always should be called as a witness to swear that he acted upon the inducement. At the time when *Pasley* v. *Freeman* (1) was decided, and for many years afterwards, he could not be so called. I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In *Redgrave* v. *Hurd* (2) the late Master of the Rolls is reported to have said it was an inference of law. If he really meant this he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law. Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act. I quite agree that being a fair inference of fact it forms evidence proper to be left to a jury as proof that he was so induced. But I do not think that it would be a proper direction to tell a jury that if convinced that there was such a material representation they ought to find that the plaintiff was induced by it, unless one of the things which the late Master of the Rolls specified was proved; nor do I think he meant to say so. I think there are a great many other things which might make it a fair question for the jury whether the evidence on which they might draw the inference was of such weight that they would draw the inference. And whenever that is a matter of doubt I think the tribunal which has to decide the fact should remember that now, and for some years past, the plaintiff can be called as a witness on his own behalf, and that if he is not so called, or being so called does not swear that he was induced, it adds much weight to the

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(1) 20 Ch. D. 44.

(2) 1 Sm. L. C. 183 (8th ed.).

(3) 2 Sm. L. C. 66, 73, 86 (8th ed.).

(4) 3 Bulst. 95.

(1) 2 Sm. L. C. 66, 73, 86 (8th ed.).

(2) 20 Ch. D. 21.

doubts whether the inference was a true one. I do not say it is conclusive.

The principal facts are not now much in controversy. The defendants were employed by Messrs. Hannay & Co. to assist in getting up a limited company to take over their works, and they were to receive a commission (amounting to some thousands of pounds) if they succeeded in floating such a limited company. They prepared a prospectus, and on the 27th of May 1873 circulated that prospectus with a lithographed letter, which are to be found at page 397 of the appendix. On the 31st of May 1873 the defendants circulated a second letter with what is called an abridged prospectus. These are to be found at page 407 of the appendix.

Pausing here I may say that I do not think it can admit of dispute that the defendants intended by those letters and prospectus to induce those to whom they sent them to apply for shares in the projected limited company. Amongst others they sent them to the plaintiff. He was not a customer or client of the defendants (I do not know that it would have made any difference if he had been), but he was a man of business, who had himself turned his own business into a limited company and had taken shares in other companies, and was quite competent to form an opinion for himself. He was, however, in my opinion entitled to consider the letters and prospectus as amounting to a representation to him that all stated in that prospectus was true. He did a day or two after receiving the second letter and the abridged prospectus apply for 100 shares, expecting, as he says, that he might get 20, but the whole 100 were allotted to him. He paid the calls amounting to £5000, and the limited company having completely failed he lost the whole; and if he is entitled to recover on the ground that he was by fraudulent representations induced to take the shares, he is entitled to recover £5000 as damages.

Nothing that happened after he applied for the shares could have had a share in inducing him to apply for them, and therefore I think that the circular subsequently issued by the defendants can have no bearing on this part of the case, whatever bearing it may have on other questions.

And now, after this perhaps too long preamble, I proceed to state why I think that the finding that the plaintiff was induced to buy the shares by that passage relating to the turnover and output, cannot be supported. The passage is short, and though it probably is present to the minds of your Lordships, I will for convenience of reference read it once more: "The ironworks are the largest and most important in Scotland and have been equipped in a substantial, complete and permanent manner. They can now produce at the rate of 1500 tons of finished bars and plates per week, or about 75,000 tons per annum. The rolling mills with some slight alterations will be capable of turning out 90,000 tons of manufactured iron per annum. The present value of the turnover or output of the entire works is over £1,000,000 per annum."

As early as the 12th of June 1877 the defendants in answer to an interrogatory shewed, in my opinion, what they at that time said was the meaning of this very obscure passage. They swore as follows:—"The then value of the annual turnover or output of the works is a necessary arithmetical result from the amount of the weekly productiveness of which the particulars are given by the last preceding paragraph taken in connection with the then existing average prices, after allowing reasonable deductions for short working, defects and casualties. The current price in Glasgow of bars and rails in May 1873 was £13 10*s.* per ton, of nail rods £15 10*s.* per ton, of hoops £17 per ton, and of sheets £20 per ton. Taking a mean of only £15 per ton on 1500 tons per week and allowing only fifty weeks in the year the value of the year's turnover or output would be £1,125,000."

The defendants interrogated the plaintiff, requiring him "as to each and every of the allegations of misrepresentations contained in the statement of claim" to separately and categorically state, first, what he understood to be the meaning of the particular representation; thirdly, in what respect or respects he now alleges that every or any of the said representations were untrue. And on the 23rd of January 1878, seven months and more after the defendants' answer which I have read, the plaintiff answers thus: "First, I understood the meaning of such misrepresentations respectively to be that which the words composing them obviously convey, and I am unable to express in any other words what I understood to be the meaning thereof. Thirdly, I allege that such misrepresentations are untrue in manner and respects appearing in the said statement of claim, and I have nothing to add to or detract from the said statement of claim."

It is said that the plaintiff could not say more than that he understood the words in their natural sense. I think that his legal advisers had notice ever since the 12th of June 1877, if not before, that the defendants contended that the meaning of this obscure phrase was that at the then present prices of bars and plates 75,000 tons would be worth more than a million. So understood the representation was true. This meaning is one at least so plausible that Cotton L.J. thought it the right meaning.

If the statement as to prices at the date of the prospectus had been inserted in it so as to make it read thus: "The current price of bars is now £13 10*s.* per ton, of plates £15 to £20 per ton, according to their quality, so that, assuming the proportion of bars to plates not to be unreasonably large, the mean price of bars and plates is more than £13 6*s.* 8*d.* The present value of the turnover," &c., I think a reasonable man would have probably thought that the meaning was that put upon it in the defendants' answer to the interrogatories, or at least would not have acted, without some further inquiry, on the belief that it meant something else. It is quite true that those prices are not stated on the face of the prospectus; and though the plaintiff, being himself engaged in a branch of the iron trade, was not unlikely to know what those prices were, I do not find it anywhere asserted that he knew them; but it is nowhere, that I can find, asserted that he did not know them.

I cannot myself see what difficulty there could have been in saying in answer to the defendants' interrogatory, "I understand the meaning of the representation as to turnover to be that Messrs. Hannay's works had actually during the past year turned out produce that at present prices would be worth more than a million; and that was untrue, for they never produced half as much." When I say this I mean, of course, if the plaintiff could truly swear to that effect. If he did not so understand it there was, of course, a very good reason for not so swearing.

It is true that the answers to interrogatories are prepared by the legal advisers; and the plaintiff, if, at the trial, he had sworn, "I did so understand it," and had been asked, "Then, if so, why did you not say so in January 1878?" might have had an excuse by saying, "I swore what was true, and if I should have sworn more, that was my lawyer's fault, not mine." But he never at any time, from first to last, swears anything of the sort, and I think it is impossible now to listen to the suggestion that the counsel for the plaintiff at the trial in November 1881 were taken by surprise at finding that the defendants' counsel still put on this passage the interpretation which had been put upon it in the answer to the interrogatories so long ago as June 1877. If they were surprised they had no right to be so. But I think the fair conclusion is, that they feared to ask the question in examining the plaintiff in chief, lest he should answer that he did not understand the prospectus as meaning that there had been an actual output during the last year, or at least that he would not swear that he was influenced by his belief in that statement. The counsel for the defendants did not choose on cross-examination to risk bringing out of a hostile witness evidence which his own counsel had not brought out in chief. If I am right in the opinion which I have already expressed, that the burthen lay on the plaintiff to prove that he was induced, I think they acted wisely. If the plaintiff had made a primâ facie case which required affirmative proof of an answer from the defendants, I think it would be otherwise.

It will be observed that this opinion is quite irrespective of what the true construction of the prospectus is. I should think that a reasonable man would give much more weight to a statement of fact that the actual produce of the works had been so much, than to a statement that their productive power was estimated at so much, and therefore that the statement, if understood as Fry J. and Lindley L.J., and I believe some of your Lordships think, was material. I should think that a reasonable man reading this prospectus would hardly act on the faith of such an obscure statement without further inquiry. But he might so act. My reason for supporting the judgment of the Court of Appeal is, that I do not think it proved that he did so act. In the case of the misstatement as to Mr. Grieve being a director, I think it positively proved that he did not.

I may say, though it is not necessary for the decision of the case, that I think, as a matter of law, the motive of the person saying that which he knows not to be true to another with the intention to lead him to act on the faith of the statement is immaterial. The defendants might honestly believe that the shares were a capital investment, and that they were doing the plaintiff a kindness by tricking him into buying them. I do not say this is proved, but if it were, if they did trick him into doing so, they are civilly responsible as for a deceit. And if with intent to lead the plaintiff to act upon it, they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff putting that meaning on it is misled, I do not think they can escape by saying he ought to have put the other. If they palter with him in a double sense, it may be that they lie *like* truth; but I think they lie, and it is a fraud. Indeed, as a question of casuistry, I am inclined to think the fraud is aggravated by a shabby attempt to get the benefit of a fraud, without incurring the responsibility. But I do not think there is any case made out against the defendants of that sort.

There is a third possible case, that a man may make a statement which he intended to mean one thing only, but which negligently and stupidly he sends out in such a shape as to bear another meaning, and the plaintiff acts upon that meaning. On that I need only say that the defendant, in such a case, would have great difficulty in establishing that it was only honest blundering; but if he did, as for instance, by shewing that his manuscript sent to the printer, contained the word "not," which by some printer's error was omitted in the published prospectus, or that 10,000 was by a printer's error printed 100,000, which escaped notice in revising the proofs, I should say it was not a fraud, though perhaps gross negligence. But the question whether in such a case there would be any, and if any, what remedy for the party misled, may, I think, safely be left for decision when it arises. It never has arisen and I think is not likely ever to arise. It certainly does not arise now.

LORD WATSON:—

My Lords, I am of the same opinion. Shortly after this case was heard at your Lordships' bar I had an opportunity of carefully considering the judgment which has just been delivered by the noble and learned Lord (Lord Blackburn), and finding in that judgment all the reasons which have led me to think that the decision of the Court of Appeal ought to be upheld, I have not thought it necessary to repeat them.

LORD BRAMWELL:—

My Lords, I am content that your Lordships' judgment should be as indicated by the noble and learned Lords who have spoken, but I am not content with the reasons they have given.

It seems to me that the prospectus is capable of but one meaning. I know, as a matter of fact, that a most able and acute mind has found it capable of a different meaning from that which I think it is alone capable of; but according to my understanding (which of course I must act upon, although I may have a sort of general distrust of its value) this part of the prospectus —the main matter—that which alone is of any consequence, is capable of but one meaning, namely, that the actual output was over £1,000,000 sterling per annum or over that rate. I quite agree with the noble and learned Earl on the woolsack that it may mean that the actual output was at that rate, or that it had come to over that figure in a year. But that either it was at the rate of over one million a year, or was in fact over one million a year, seems to me the only meaning that can be attached to that statement in the prospectus.

Now, if that was the meaning of it, that statement was untrue, because there was not an output actually of over a million a year nor one at that rate. Further, I think the plaintiff said that he so understood it. It was unfortunate that he was not more examined or more cross-examined, but I declare the man gave the only answer I could have given if I had been in his situation: "I understood it according to its natural meaning." I do not see what more he could do, and it seems to me impossible to suppose that he was saying "I understood it to mean that

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fifteen times £75,000 came to over one million," because that he knew perfectly well, as does everybody else; and if his answer is understood as meaning that, his answer is understood as meaning, "I make no complaint of untruth in it, because it means this, that £75,000 multiplied by 15 is over one million." It seems to me, therefore, that the statement was untrue; that it was understood in the sense in which it was untrue, and consequently that the plaintiff proved all that he could prove, the only other possible question being one of inference to a certain extent, namely, was it fraudulent?

Now I confess that upon that matter I have entertained and do entertain the greatest doubt. Assuming that the statement means that the actual turnout was over one million a year or at the rate of over one million a year, and assuming that the plaintiff so understood it, it nevertheless remains to be considered whether that was a fraudulent statement on the part of the defendants. I am not satisfied that it was, and I will shortly state my reasons. I cannot but think that the defence which has been made for the defendants is one they would not have made for themselves if they had been let alone. I think it is their counsel's defence. The defendants have sworn that they were told by Hannays, who were respectable people, people to be trusted, that the actual rate of production was such that it was over one million a year, and that they believed it, and in addition to that one of them has given the convincing proof of his sincerity that he staked £5000 upon it, which he has lost. I am not satisfied that these men did not believe the statement to be true. Under these circumstances I am not dissatisfied that your Lordships should affirm the judgment that has been given in their favour.

The question here is not whether they should be in any way punished for most improvident and rash statements (more than one) in the prospectus, but whether we are satisfied that this particular statement was a fraudulent as well as what it was to my mind, an untrue statement. I am not satisfied of that. Let me not be misunderstood. An untrue statement as to the truth or falsity of which the man who makes it has no belief is fraudulent; for in making it, he affirms he believes it, which is false.

I think it is a pity more time was not taken before Mr. Justice Fry's judgment was reversed, and I confess I should very much have liked if it had been a possible thing to have had this case tried over again. I should like to have been present at the trial and to have had an opportunity of putting some questions to the witnesses, both the plaintiff's and the defendants', which it seems to me might very properly and usefully have been put. But that is an impossibility. We must either affirm the judgment or reverse it, and I am not so satisfied that a fraud has been made out against these defendants that I wish to reverse it.

Orders appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals 18th February 1884.

Solicitors for appellants: *Darley & Cumberland, for Newstead & Wilson, Leeds.*

Solicitor for respondent Adamson: *H. T. Chambers.*

Solicitors for the other respondents: *Ashurst, Morris, Crisp & Co.*

[HOUSE OF LORDS.]

COLLINS . . . . APPELLANT; H. L. (Sc.)

AND 1884

COLLINS . . . . RESPONDENT. *Feb.* 18.

Husband and Wife—Wife's Adultery—Condonation—Subsequent acts of Misconduct—Doctrine of Canon Law—Non-revival of condoned Adultery in Scotch Law—Weight of English Divorce Cases.

By the law of Scotland full condonation of adultery (remission expressly or by implication in full knowledge of the acts forgiven), followed by cohabitation as man and wife, is a remissio injuriæ absolute and unconditional, and affords an absolute bar to any action of divorce founded on the condoned acts of adultery. Nor can condonation of adultery—cohabitation following—be made conditional by any arrangement between the spouses.

Although the condoned adultery cannot be founded on, condonation does not extinguish the guilty acts entirely, and they may be proved so far as they tend to throw light upon charges of adultery posterior to the condonation.

A wife confessed to several acts of adultery with E. Her husband forgave her and resumed cohabitation on the alleged condition that she should not speak or hold any communication with E. again. Subsequently she met E. by appointment several times under suspicious circumstances; but, admittedly, no act of adultery could be proved. The husband sued for a dissolution of the marriage on the ground that the condoned adultery was revived by the wife's subsequent conduct:—

Held (affirming the decision of the Court below), that to obtain a divorce he must prove adultery subsequent to the condonation, and no less.

The doctrine laid down in *Durant* v. *Durant* (1 Hagg. Ecc. Rep. at p. 761) not approved without qualification.

Dent v. *Dent* (34 L. J. (P. M. & Ad.) 118; 4 Sw. & Tr. at p. 106). Direction of LORD PENZANCE to the jury questioned on principle; and that case distinguished from *Blandford* v. *Blandford* (8 P. D. 19, adultery reviving desertion).

Per LORD BLACKBURN:—The doctrine of revival of adultery as a ground on which a divorce has been granted is to be strongly objected to as varying the status of married persons. On principle, a reconciliation being entered into with full knowledge of the guilt and with free and deliberate intention to forgive it, where that reconciliation is followed by living together as man and wife, the status of the couple ought to be the same and not more precarious than if there was a new marriage.

Per LORD BLACKBURN:—Assuming it to be now established English law that any matrimonial offence, though forgiven, may be revived by any other matrimonial offence of which the Courts take cognizance, it is very modern law, and not so obviously just and expedient that this House ought to infer that it either was or ought to have been introduced into the law of Scotland.

See LORD WATSON's opinion (p. 257), for the terms of a remission of adultery which would not constitute plena condonatio in the law of Scotland.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland, in a suit for divorce, instituted by the appellant Alexander Glen Collins, against Cornelia Thomson Pattison, or Collins, his wife, and the respondent, William Henry Eayres.

The appellant was married to his wife in 1872, and they had issue four children. In July, 1881, Mr. and Mrs. Collins were yachting in the Sound of Mull, and being at anchor in Ardtornish Bay, on the 27th of July, Mr. Collins noticed his wife attempting to conceal a letter from him, which she eventually tore up and threw overboard. He lowered a boat and obtained the fragments. On returning to the yacht, Mrs. Collins confessed to him that she had been guilty of adultery with Eayres on several occasions in that year. She asked for forgiveness; Mr. Collins desired her to write down all that she wanted forgiven. Mrs. Collins then wrote a letter, which after giving a circumstantial account of her adulterous connection with Eayres, continued:—"But oh, dear Alick, if you do but forgive me all this, I promise never again to dishonour you or myself again."

As to what occurred after this letter was written, Mr. Collins said in his examination:—

When I got that letter I said at first that I would consider whether I would forgive her or not, and shortly afterwards I told her for her children's sake and her own sake, on condition she never spoke to or wrote to the man again, I should forgive her. I think these were the only words I used. I repeated them several times.

In cross-examination he said:—

I expressed to my wife my resolution to forgive her immediately after her confession, and in the cabin of my yacht late in the afternoon. I slept in the same cabin with her that night, there being one berth on the one side of the cabin and one berth on the other. I had resolved to forgive her, and had expressed my forgiveness before night. The precise words which I used in expressing my forgiveness were, that if she would promise never to speak or write to him again I should forgive her on these conditions. That was after I got the letter from her. The reason why she wrote the letter was that she went on telling me different instances of her infidelity till I got sick of it, and I asked her to write down everything she had to confess. That was with the view of my granting her forgiveness . . . . She agreed to what I expressed. She repeated the words after me—that she never would speak or write to the man again, and never would dishonour me again. She repeated that to me several times, I repeated to her several times the terms on which I would forgive her.

Mrs. Collins, in her examination, stated :—

In 1881 circumstances occurred which led to my making a statement to my husband as to certain occurrences in my life that year. He expressed to me forgiveness for what I had told him. He fully and freely forgave me. He brought me a letter written out in pencil by himself, and asked me to copy it and sign it, and give it back to him, which I did. . . . I made a full statement to him, and he expressed his forgiveness fully and freely. (*Q.*) Can you say, with certainty, whether anything was said about its being on condition that you should not see or speak to Eayres? (*A.*) There was no such condition whatever.

On being further examined by the Court, Mrs. Collins said :—

When my husband forgave me he did not require me to promise that I should never see Eayres again. There was not a word spoken about that; he gave me full and free forgiveness, on condition I told him all I had done. He did not forbid me having anything to do with Eayres again.

Eayres was a professional musician, a violinist, who had been acquainted with Mrs. Collins before her marriage. After the reconciliation, Mrs. Collins proposed that she should write to Eayres to get back a ring and some other presents, which she had made him, and also her correspondence. A draft letter was prepared, and Mrs. Collins re-wrote it and sent it.

In this letter Mrs. Collins told Eayres she had been unable to bear the life she had been leading any longer, and had told her husband everything, and added, " my eyes are fully opened to all my sin, and I hope in the future to live a true life, and ask your forgiveness for any injury I have done you. You must never make any attempt to see me again, as I place myself fully under my husband's protection, and will be his only now and for evermore."

The ring and correspondence were not returned by Eayres. Mr. Collins' solicitor inquired for them, and he was informed that most likely the jewellery had been pawned, and the letters burnt. In December, 1881, Mr. and Mrs. Collins were living in

Glasgow. The appellant, thinking Eayres might be engaged at some concerts which were advertised, proposed to Mrs. Collins that she and her sister should go to England. She declined, giving various reasons, which he did not consider satisfactory. The first concert was fixed for the 12th of December, and Mr. Collins, when he found Eayres was to be one of the performers, engaged a detective to watch him. In December Mrs. Collins was observed near Eayres' lodgings, and in January, 1882, she was seen to speak to him, and on the 26th of January she met Eayres according to appointment about five o'clock, and walked with him arm-in-arm up an uninhabited road called the Eglinton Drive, and according to the suggestion of the detective and his wife, who were watching them, they went into an unfinished house, where they remained for about ten minutes, and then walked away and separated. On the 27th she spoke to Eayres again. Mrs. Collins said in her examination that she had seen Eayres several times in January, but she sought these interviews with him with the sole object of getting back her ring and correspondence, because she never felt safe that he or his wife would not expose her and her husband so long as he had these letters in his possession. She added that she knew on the 26th of January, 1882, and long before, that she was being watched. Both Mrs. Collins and Eayres in their examination denied that they had committed adultery either on the 26th of January, 1882, or at any of the other meetings in that or the previous month.

On the 27th of January the detective made his report of the walk on the previous day of Mrs. Collins and Eayres. On the 29th of January Mr. Collins left his home, and on the 4th of February desired Mrs. Collins to leave his house, and issued, on the advice of his lawyers, his summons in this action praying for a decree of divorce on the ground of her alleged adultery with Eayres, who was also called as co-defender.

He set out (Condes. 3), the dates prior to the forgiveness, on which the respondent had committed adultery, and his forgiveness of these acts, "on the express condition, undertaken by the respondent at the time, as the condition of condonation, that she should never again speak or write to Eayres." He then averred

(Condes. 5), that the condition was broken by the respondent, inasmuch as in December, 1881, and January, 1882, "she and the co-defender (Eayres) renewed their acquaintance and intimacy," and "were in the habit frequently of walking together alone." Lastly, he averred (Condes. 6), "that on or about the 26th of January, 1882, and after dark, the respondent committed adultery with the co-defender (Eayres) in or near an unfinished and unoccupied house in Eglinton Drive, Kelvinside, Glasgow, or in or near a mason's shed adjoining."

In answer to the action the respondent pleaded condonation with respect to the adultery averred prior to the 27th of July, 1881, and denied the act averred to have been committed on the 26th of January, 1882. The co-defender Eayres did the same.

The respondent's pleas in law were as follows:—

(1.) The defender not having been guilty of adultery as libelled ought to be assoilzied. (2.) The averments in article 3 of the condescendence are not relevant to be admitted to probation; and, separatim, they cannot form the ground of a decree of divorce against the defender. (3.) The pursuer having continued matrimonial cohabitation with the defender in the knowledge and belief aforesaid, he cannot found to any effect upon the acts alleged in Condescendence 3, and, separatim, he cannot obtain decree of divorce on the ground thereof.

The appellant's action also contained a conclusion for £1000 damages against Eayres. On the 22nd of March, 1882, the Lord Ordinary (1) allowed the parties a proof of their averments (2).

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(1) Lord Fraser.

(2) 9 Court Sess. Cas. (4th Series), 785. The Lord Ordinary said: "The defender maintained that no proof ought to be allowed of acts of adultery prior to the condonation, which the pursuer himself states that he had made in favour of the defender, as set forth in the 3rd article of his condescendence. If it had not been for the qualified terms in which the condonation was given, the Lord Ordinary would have sustained this plea. He is of opinion that the law of Scotland, following in this respect the canon law, absolutely wipes out any guilt prior to condonation, and it cannot be brought up again to the prejudice of the pardoned spouse for any purpose whatever (*Lockhart* v. *Henderson*, Morison, App. vide Adultery, No. 1),—'that reconciliation is a complete objection on both sides to proof of prior guilt then known to the parties.' The exact point decided in the case was, that condoned adultery could not be revived with the view of making it a substantive charge entitling to divorce, and this is the length to which Erskine carries the effect of remissio injuriæ. He says, 'cohabitation by the injured party, after being in the knowledge of the acts of adultery committed by the other

This interlocutor permitted the appellant to produce evidence of the condoned adultery: the respondent Mrs. Collins, contending that the condoned acts should not be allowed to proof, reclaimed

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spouse, if it has not been constrained by force or menaces, imports a passing from or forgiveness of the prior injury, and is therefore sufficient to elide any action of divorce that may afterwards be pursued upon those injurious acts.' (1, 6, 45).

"The pursuer, however, says that he does not mean to found upon the condoned adultery as a ground for divorce, but as shewing how intimate the defender and co-defender were with each other, and the high probability that, if they had opportunity, they would repeat their adulterous conduct. Even to this limited extent (and the demand is plausible enough), the Lord Ordinary could not admit any proof of what the condonation had swept away. He conceives that the authorities upon this subject, such as Sanchez, which have guided the Consistorial Courts in Scotland, forbid any reference whatever to the wife's former adultery. The case is to be treated the same as if the marriage had just begun, and the wife were pure and innocent. The case is different according to English law, which treats all condonations as conditional, and as being repealed by any subsequent conjugal misconduct. A striking illustration of this will be found in the most recent cases on the subject (*Newsome* v. *Newsome*, 6th of June, 1871 (Law Rep. 2 Prob. & Div. 306)), and the import of the English cases is, that to revive condoned adultery, it is not necessary that the new injury should be of the same nature, but that cruelty, desertion, or other improper conduct was sufficient (*Snow* v. *Snow*, 2 Thornton's Notes Cases, Supp. p. 1; *Bramwell* v. *Bramwell*, 3 Hagg. Ecc. Cas. 618; *Westmeath* v. *Westmeath*, 2 Hagg. Ecc. Cas. Supp. 1, and other cases noted in Pritchard's Dig. p. 74, No. 71).

"This is not the law of Scotland, as the case of *Lockhart* shews. Sanchez states the doctrines (De Matrimonii 10, 5, 21) in a sentence, 'primum illud adulterium jam est remissione extinctum. At crimen semel transactione aut indulgentia accusatoris extinctum non potest amplius ab eodem in judicium deduci.' Had, therefore, this been the simple case of the innocent husband claiming right to prove condoned adultery against a wife who had relapsed, with the view merely of shewing the intimate relationship between her and her paramour, the proof would not have been allowed. But the speciality in the case is, that the pursuer avers that condonation was given, 'on the express condition undertaken by the defender at the time as the condition of the condonation, that she should never again speak or write to the co-defender. The said condition has been broken by the defender as aftermentioned.' That a husband who has been wronged by the infidelity of his wife may attach a condition to his pardon, is a proposition to which no sound objections are apparent. It was within his power to give or withhold the pardon, and if so, there is nothing contrary to principle or to public policy to hold that he could state the terms and conditions upon which she was to be again reinstated in her place as wife. This, in truth, is shewn by the present state of the law of England, which is the same, without any to the Second Division of the Court of Session. Their Lordships on the 16th of May, 1882, refused the note, and adhered, remitting the cause to the Lord Ordinary to proceed (1). This interlocutor was not appealed from.

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express condition, as the alleged express condition would make the present case (see contra, post, p. 233).

"In these circumstances, it is necessary to allow the pursuer a proof of the conditional nature of the remissio, and seeing this proof must be taken, it would divide the case, without any apparent advantage, if a proof were not allowed at the same time of the condoned adultery. Of course, if the condonation was unconditional, no attention whatever will be given to such proof.

(1) LORD CRAIGHILL said :—"The contention of the defender is, that having been condoned, evidence regarding them, for any purpose whatever, cannot be admitted. I am of opinion that this contention is erroneous, and has been properly overruled. I am not to be held, however, as concurring in all the reasons which the Lord Ordinary has given for his judgment. It is sufficient for me to say that upon one ground, even if there were no other, the proof granted, as I think, has been properly allowed. Assuming the acts of adultery condoned can never be made grounds of action for a divorce, it does not follow that evidence as to these may not be received when the question is whether subsequent acts of adultery have been committed. There is no authority against this, for it is a misapprehension to say that the decision in the case of *Lockhart*, or the passage quoted from Erskine, is an adverse authority. The reason of the thing appears to me to be an ample justification. Were an opposite doctrine to be sanctioned, the effect of condonation would be not merely to protect against divorce for the adultery condoned, but to limit the proof by which subsequent acts could be established. This consideration of itself appears to me to be sufficient to support the judgment of the Lord Ordinary, though certainly it is not the ground upon which that judgment has been rested. The view upon which the Lord Ordinary proceeds is, that the acts of adultery condoned may not be made grounds for a subsequent divorce, but that the present must be treated as an exception from the rule, inasmuch as the condonation was conditional. Whether there is room for this distinction may be questioned, because much may be said in favour of the opinion that every condonation is conditional upon subsequent behaviour. A decision upon this point, however, is at present unnecessary, and therefore ought not in the meantime to be pronounced. Should circumstances after the proof has been led render a decision necessary, the question will be taken up and be the subject of judicial determination. Meantime I reserve my opinion. There is another speciality in the present case. A co-defender is here sued for damages, and whether the effect of condonation extends to him is a point which hitherto has not been decided, and may properly be postponed."

LORD RUTHERFURD CLARK :—"The

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On the 27th of June, 1882, the Lord Ordinary having taken the proof and heard counsel, pronounced the following interlocutor :—

Finds that the defender committed adultery with the co-defender within the Clarendon Hotel, Princes Street, Edinburgh, on the 4th of February, 1881; and

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question now before us is whether we should allow proof of the acts of adultery prior to the condonation, reserving in the meantime the effect of such proof—should the acts be established—on the result of the action. It is possible that one or other of two effects attach to proof of the alleged prior acts of adultery. On the one hand, they might form the substantive ground of divorce, or on the other hand, they may be regarded as throwing a certain light on the behaviour of the defender and co-defender in December, 1881, and subsequently, so as to enable the Court to form a correct conjecture as to the truth of the accusation made against them. I give no opinion on the question as to whether the pursuer is entitled to found on the prior acts of adultery as affording ground for divorce. I purposely refrain from expressing any opinion upon that point, because, if the acts be proved, it must necessarily come up for decision at a later stage. But upon the question whether they may be properly used for the other purpose which I have indicated I have no doubt whatever. I do not proceed in any degree on the condition said to have been attached to the condonation. I think that the pursuer is entitled to lay before the Court all the evidence which will enable it to form a correct judgment on the facts of the case, and I do not think in such a case that there is anything more important than all possible evidence as to the behaviour of the parties throughout their whole intimacy. For that purpose I think that the evidence in question should be admitted. The Lord Ordinary has said that in the law of Scotland condonation wipes out all guilt prior to it, so that it cannot be brought up again to the prejudice of the pardoned spouse for any purpose whatever, and quotes authorities to support that view. I do not, however, look at these authorities in the same way. It seems to me that the case of *Lockhart* decides that an act of adultery which has been condoned cannot of itself form the sole ground of divorce, and that the dictum of Erskine is precisely to the same effect. The opinion of Sanchez, which is also relied upon, appears to go no further. These authorities lay down that acts of adultery prior to condonation will not found an action for divorce, but they do not say that the Court is not to have evidence of the whole conduct of the accused persons before it."

LORD YOUNG said:—"I concur. It has not been doubted since the case of *Lockhart* in 1799, and I should have difficulty in finding grounds for a contrary view, that a husband who has condoned an act of adultery on the part of his wife should have no action against her for what he has condoned—there being no subsequent misconduct. This last is the feature of *Lockhart's Case*. In that case the wife's adultery, which had admittedly been condoned, was the sole charge against her, and I should have thought there was very little difficulty felt in deciding that that could not be made a ground of divorce. That is all that *Lockhart's Case* decided. It does not also in the Great Northern Hotel, King's Cross, London, on the 23rd of May, 1881; and also at a hotel in Dorking on the 3rd, 4th, 5th, and 6th days of June, 1881; and also upon one occasion in the year 1881 in the pursuer's house at 9 Windsor Terrace West, Glasgow: Finds that the whole of these acts of adultery on the part of the defender were condoned by the pursuer: Finds that the defender has not been guilty of such conjugal misconduct since said condonation as would entitle the pursuer to declare the said condonation revoked, so as to enable him to found upon these acts of adultery as a ground of divorce:

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decide nor give any indication as to what the law is in such a case as this, and what amount of subsequent misconduct will be sufficient to forfeit the condonation so as to obliterate it and disentitle the forgiven person to plead it. No decided case or dictum lays down any rule as to that. It is not necessary at this stage of this case to determine whether, if the pursuer establish misconduct on his wife's part subsequent to the condonation, she shall be held disentitled to plead condonation. But I think it is perfectly competent in an action in which subsequent misconduct is alleged for a husband to prove the conduct of the accused parties prior to the condonation. That is plain common sense, and the authorities lay down nothing opposed to it. There is no such rule of law, as the Lord Ordinary seems to think there is, to the effect that the conduct of a guilty party prior to condonation may not be inquired into with respect to subsequent misconduct. The law in England seems to be undoubted on the point. I am very clearly of opinion that this case is not made at all special by the alleged express condition adjected to the condonation when given. I do not think there is anything in that at all, and I cannot agree with the Lord Ordinary when he says,—"That a husband who has been wronged by the infidelity of his wife may attach a condition to his pardon, is a proposition to which no sound objections are apparent. It was within his power to give or to withhold the pardon, and if so, there is nothing contrary to principle or to public policy to hold that he could state the terms and conditions upon which she was to be again reinstated in her place as wife." I cannot agree with that at all. I am not of opinion that if she spoke or wrote to the man she would therefore forfeit the condonation. By Act of Parliament a man is entitled to entail his estates on any lawful condition he may please, but I am not aware that a man can say to his wife, "We will let bygones be bygones, but if you do something—say, do not get up at six in the morning—I shall have my action." That cannot be so. I think that condonation must be rational. It must imply, "I forgive you for your own and our children's sake, but you shall not be entitled to plead this against me if you misconduct yourself with this man again." That is plain common sense. All we need determine at this stage of the case is that the whole case must be put before the Court—the conduct of these accused parties over the whole time of their intimacy. I, in common with your Lordships, reserve my opinion on the other point, although I have a strong impression what will be the effect of the evidence of former misconduct if the pursuer's allegations are accurate."

In particular, finds it not proved that the defender, on or about the 26th of January, 1882, committed adultery with the co-defender in or near an unfinished and unoccupied house in Eglinton Drive, Kelvinside, Glasgow, or in or near a mason's shed adjoining: Therefore assoilzies the defender from the conclusions of the action for divorce; finds her entitled to expenses from the pursuer: As regards the co-defender, finds in the circumstances of this case that he is not liable in damages as concluded for; finds no expenses due to the co-defender: With regard to the conclusion of the summons as to the custody and keeping of the children of the pursuer and defender, finds it unnecessary, in hoc statu, to pronounce any deliverance thereon, but reserves to either party to make application in this process to the Court in reference thereto, in the event of the pursuer and defender not again cohabiting as husband and wife, and decerns (1).

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(1) 10 Ct. Sess. Cas. 4th Series, 250. The Lord Ordinary, having stated the facts; that he was unable to come to the conclusion that the defender's determination to see Eayres was with any guilty intent, and that it was not proved that adultery took place on the 26th of January, 1882, continued—

"3. But then comes the question, that supposing adultery not to have been proved as having taken place on the 26th of January, is the pursuer entitled,—in consequence of the conduct of the defender, in violating the condition of never speaking to Eayres again,—to demand divorce because of the previous adulteries that had been condoned?

"The doctrine of condonation of adultery is derived in Scotland from the Canon Law, which was the law administered in this country in this class of cases (except in so far as altered by statute) both before the Reformation and ever since. That law was simply this, that if one spouse condoned the adultery of another, the offence was entirely extinguished. It could not be referred to, notwithstanding the subsequent misconduct of the erring spouse. The case was the same as if a new marriage had been entered into. It was a matter entirely within the power of the innocent spouse to condone the offence, or to insist for the remedy which the law allowed—separation or divorce; and being entirely within his right, the Lord Ordinary is of opinion that he was entitled to adject any reasonable condition to his condonation. He was not, of course, entitled to adject absurd or fantastical conditions. But the matter being for him to forgive or to refuse forgiveness, it does not seem to be unreasonable for him to stipulate that the condonation should only have effect on the condition that intercourse with the paramour should for ever cease. This question in regard to express conditions attached to the condonation was considered by Dr. Lushington in the case of *Bramwell* v. *Bramwell* (3 Hag. Eccl. Rep. p. 618). He refers to the matter as follows, at p. 629: 'Condonation, however, has been set up: but this condonation is not only conditional in the eye of the law, as all condonations are, but it is specially so. . . . Assuming that the condonation was complete, and extended to all the previous adultery, under what circumstances and on what conditions was it given, and what was the duty of the husband, and what was his conduct afterwards? He solemnly engaged to separate himself entirely from this woman (Jeffery), and if

The appellant having reclaimed, the Second Division, on the 1st of December, 1882, pronounced this interlocutor :—

The Lords having heard counsel, Recal the said interlocutor: Find that the pursuer has failed to prove that the defender committed adultery with the

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possible not to carry on the least correspondence with her: yet shortly after this Mr. and Mrs. Bramwell go to Epsom; and he clandestinely returns with Jeffery to Tunbridge Wells, &c. Can it be contended that this was conduct in conformity with Bramwell's solemn engagement? Here was not a solitary meeting, but meetings frequent, for a length of time, and purposely concealed from his wife. Is the Court to believe from the ingenious suggestions of counsel, or from the asseverations of the party, that these meetings were merely to settle accounts? It is true Wiles states that she did see them engaged about accounts; but was it not Mr. Bramwell's duty to have been specially cautious that such interviews should not occur without information to Mrs. Bramwell, and should take place only in the presence of a third party? It is too much to ask of the credulity of the Court not to infer from this conduct a criminal attachment.' The Lord Ordinary has held it proved that the secret interviews which the defender had with the co-defender in the month of January were not with a guilty intent, and therefore he cannot reach the conclusion to which Dr. Lushington pointed, namely, that the breach of the condition on which condonation was given, revived the right to divorce.

"Mr. Fergusson, who was long a Consistorial Judge, refers to this matter of condonation in his treatise on Consistorial Law (p. 178): also Lord Watson's opinion, p. 249.

"Now, then, what was the meaning of the 'particular agreement' between the parties when the defender made the confession of her guilt at Ardtornish Bay? It must be construed with reference to the purpose that the pursuer naturally must have had in his mind at the time. According to the pursuer himself, he exacted from his wife a promise that she would not 'dishonour' him again. Without putting too strict a meaning upon that word, it may be held that the pursuer required, and the defender promised, that there should not be any intercourse of an intimate character,—not merely sexual intercourse,—but intercourse such as is had by ordinary acquaintances, between the defender and co-defender at any future time, and that she should never voluntarily meet him or speak to him, if circumstances did not render that necessary. But it did not infer a breach of the condonation, if there had been an accidental interview between them, or an interview for a purpose other than a renewal of the old intimacy. Now, so far from the defender and co-defender wishing to renew that intimacy in the month of January, it is plain that this was against the desire of both. Eayres, no doubt, with a view in all probability to purposes of future extortion of money, refused to part with the letters and the ring, and kept the woman in constant excitement and agitation, till she seems to have lost all sense of prudence, in her endeavours to extract from him the evidence of her guilt. But the Lord Ordinary cannot hold that the express condition upon which the condonation was given has been broken; and consequently the right to sue for co-defender on the 26th of January, 1882, as libelled: Find that the pursuer cannot found on the previous acts of adultery alleged by him, in respect that such acts were condoned by him, and that such condonation is by law absolute:

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divorce for the condoned adulteries is not revived.

"4. But now to take the other view of this case, viz., that in the face of the defender's denial the condition cannot be held proved. Does the law *imply* a condition, the breach of which would revive the condoned adulteries as grounds of divorce? It was contended by the pursuer that, apart altogether from the express condition, and holding it not to be proved, the law implied a condition that unseemly, suspicious, and compromising conduct on the part of the defender, such as took place in January, 1882, was such misconduct as revoked the condonation. To this view of the law of Scotland the Lord Ordinary cannot subscribe. In England it would appear that conjugal misconduct subsequent to the condoned adultery — even though not ejusdem generis, such as cruelty—will operate as a revocation of the condonation. Sir John Nicholl in the case of *Durant* v. *Durant* (1 Hag. Eccl. Rep. pp. 733, 761) thus stated the law of England on the subject: [see *post*, p. 237]. [His Lordship then read the passages quoted by Lord Blackburn, and continued:—]

"If adultery subsequent to the condonation were proved, there would be no necessity for founding upon the adulteries that had been condoned; but the proposition is, that something less will revive the former adulteries. It seems to be the English law, that the condition of the condonation is, that the injured party shall thereafter be treated with conjugal kindness, and that unless this were carried out, divorce or separation could be obtained for the condoned adultery. The Lord Ordinary is not aware of any authority in the law of Scotland for this doctrine. Unfortunately, until recent years, the consistorial jurisdiction was exercised by a Court whose decisions are unreported; but the Lord Ordinary has had occasion to examine the manuscript records of the Commissary Court, and never found any case where there was a suggestion of this doctrine. The Scottish law on the subject is, as already said, derived from the Canon Law, wherein no such rule as to the revocation of condonation is to be found. Sanchez, the best and most learned expounder of that law, explains it, when he says, that the first adultery is, by the remissio, extinct, and can never be referred to again (lib. 10, disp. 5, ss. 19, 21).

"In enumerating the cases where divorce will not be granted, though there may have been adultery, his last head is as follows (sect. 19):—'Ultimus casus est, quando conjux innocens alteri condonat adulterium, et sic reconciliantur. Cum enim divortium sit in favorem innocentis, potest innocens cedere jure suo, delictumque condonare, et sic cessabit jus divortii. Hæc autem remissio est duplex, quædam expressa, quando, scilicet, verbis expressis innocens conjux adulterum sibi reconciliat, condonans delictum. De qua reconciliatione loquitur textus l. *si maritus* 25, § *si negaverint: ff. ad l. Juliam, de adulter*, probans ex tunc minimè, audiendum esse maritum de adulterio accusantem. Non tamen satis esset remissio mente retenta, nec signo aliquo externo conjugi nocenti expressa. Quia propositum mente retentum in his contractibus inter homines initis, nullius efficaciæ est. Deinde, quia cum

Therefore of new assoilzies the defender from the conclusions of the action for divorce: As regards the co-defender, Find that in the circumstances of the case he is not liable in damages as concluded for: Find no expenses due to him;—

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remissio illa sit velut quædam juris divortii et accusandi donatio, oportet ut firma sit, eam parti, cui fit, intimari.'

"After thus dealing with the law as to the effect of condonation, he proceeds to the question whether subsequent adultery will revoke it (sect. 21). The canonist commentator, John Lupus, maintained that it did; and he is thus disposed of:—'Imò Joannes Lupus, eod. *cap. per vestras in princ. sect.* 9, *num.* 22, ait posse forsan, attentari, ut conjux ille reconciliatus relapsus in adulterium possit etiam de adulterio condonato accusari. Sed merito illum improbant *Covarruvias*, *Barbosa*, *Azebedo*, *Surdus*, *Lodovicus Lopez*, Quoniam primum illud adulterium jam est remissione extinctum. At crimen, semel transactione aut indulgentia accusatoris extinctum, non potest amplius ab eodem in judicium deduci' *cap De his accusat.* This is the law of Scotland.

"To the same effect is Voet, who says that divorce will be granted if adultery be proved (De Pandectas, 24. 2. 5):—'Vel post adulterium perpetratum reconcilatio intercesserit, sive illa consensu aperto conjugis insontis, sive rebus ipsis et factis per concubitum ad adulterii scientiam subsecutum declaretur; cum cuique liceat juri suo renunciare, ac injuriam ei remittere, à quo eam passus est. Quod vero alibi dicuntur mariti crimen lenocinii contrahere, qui deprehensam in adulterio uxorem in matrimonio retinuerunt.'

"All the authors referred to by Sanchez and Voet speak of the prior adultery as being totally extinguished. One of them, Sande, the President of the Supreme Court of Friesland, while he lays down the doctrine in the same terms as Voet and Sanchez, illustrates it by a decision of the Court of which he was President (Decisiones Frisicæ, book ii. tit. 6, def. 2).

"'Hæc ita, nisi reconciliatio intervenerit, quæ intervenisse præsumitur, si vir sciens uxorem esse adulteram, ipsam cognoverit, vel mulier viro notoriè adultero debitum conjugale exsolverit: tunc enim ejus mores approbasse, eique agnovisse censetur. Ac adeò crimen adulterii isthac reconciliatione extinctum est: ut si postea maritus vel uxor in idem crimen relabatur, prius illud amplius in judicium deduci nequeat, sed posterioris adulterii nomine tantum agendum sit. Hinc mulier agens nomine adulterii à marito commissi ad dissolutionem matrimonii, declarata fuit (ut in foro loquuntur) non receptibilis, quia fatebatur se post admissum crimen diu marito cohabitasse, et ab ipso cognitam fuisse. Nec movit Senatum, quod aliquo modo probabatur, virum pendente lite, denuo adulterium admisisse: id enim novo processu ac novâ instantiâ persequendum videbatur.'

"The law as laid down by Pothier (Traité du Mariage, art. 520) was to the same effect: 'Lorsqu'il a éclaté un commencement de rupture entre un mari et une femme, qui a été suivi d'une réconciliation, les faits de mauvais traitements, qui ont précédé ce commencement de rupture, sont couverts par la réconciliation, qui rend la femme non-recevable à s'en plaindre. C'est pourquoi la femme ne doit pas, par la suite, être écoutée dans une demande en séparation, si ce n'est pour des faits nouveaux qui se soient passés depuis la réconciliation.'

With regard to the conclusions of the summons as to the custody of the children of the pursuer and the defender—Find it unnecessary, in hoc statu, to pronounce any deliverance, but reserve power to either party to make applica-

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"This rule was altered in France by the Code Civil. From 1803 down to 1816 divorce à vinculo was allowed in France for adultery, and the provision of the Code Civil in regard to remissio injuriæ is contained in arts. 272, 273, and 274. Art. 272 is as follows: 'L'action en divorce sera éteinte par la réconciliation des époux, survenue soit depuis les faits qui auraient pu autoriser cette action, soit depuis la demande en divorce.' Then the next art. 273, for the first time allowed a reference to condoned adultery: 'Dans l'un et l'autre cas, le demandeur sera déclaré non-recevable dans son action; il pourra néanmoins en intenter une nouvelle pour cause survenue depuis la réconciliation, et alors faire usage des anciennes causes pour appuyer sa nouvelle demande.' These articles have no longer operation in France, except in regard to articles of separation, which is the sole reparation given to an injured spouse. The reference to the earlier wrongs was thus introduced by the special legislation of the Code; and the mode in which this has been interpreted by the French Courts is thus stated by M. Demolombe in his treatise on the Code Civil (vol. ii. p. 529): 'L'article 273, en permettant de faire revivre les anciens faits, n'accorderait à l'époux qu'une faculté illusoire, s'il était même alors nécessaire que les faits nouveaux fussent, par eux-mêmes, et par eux seuls, assez graves pour faire prononcer la séparation. Aussi cette condition n'est-elle pas nécessaire; les faits anciens et le pardon même qui les avait suivis, peuvent imprimer aux faits nouveaux la gravité qui leur manquerait sans cela. Peu importe, d'ailleurs, que les faits nouveaux soient de même ou de différente nature que les faits anciens et d'abord pardonnés. Le texte (art. 273) et la raison n'exigent aucune condition de ce genre. Des excès, des injures pourraient donc faire revivre une cause résultant de l'adultère, et réciproquement.' Thus the French law has been made almost identical with the law of England,—but only through the action of the legislature. In the absence of any legislation on the subject as regards Scotland, it must be held that the law of Scotland has not advanced to this extent; and the case of *Lockhart* v. *Henderson* (Mor. App. vide Adultery, No. 1) is an authority against it. The reason for the rule of the Canon Law, and followed in Scotland, has been well stated by Chief Justice Parsons,—the Chief Justice of Massachusetts,—thus: 'It would be injustice to the wife, and immoral in the husband, to claim and enjoy as his peculiar marital rights the society of his wife, after a knowledge of her offence, and afterwards to cast her off for that same offence.' But taking it that the law of Scotland is otherwise, and that the English rule is that of this country, did the wife violate the condition of treating the pursuer with conjugal kindness by her conduct in January, 1882? What has been already said as to the breach of the *express* condition on which condonation was granted—assuming it to be proved—is applicable to the alleged breach of this implied condition. Imprudent the defender undoubtedly was, and foolish, in having secret interviews with a man like Eayres. . . . Granting all this, still, when it is found that the wife had no guilty purpose, but was intent merely to get destroyed tion to the Court with reference thereto in this process, in the event of the pursuer and defender not again cohabiting as husband and wife, and decern (1).

Mr. Collins appealed against this interlocutor; and (5th July, 1883) the case was set down for hearing ex parte as to the defender Eayres.

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that which embittered her existence,—the evidence of her former offence—it cannot be held that she violated any implied condition—taking it in the widest sense in which the English cases have regarded it—on which her pardon was granted. In regard to this matter of condonation there was a proposition submitted by the defender which the Lord Ordinary cannot adopt. It is proved that the pursuer obtained information from Knowles (the detective) as to what happened on the 26th of January, and that he thereafter slept with his wife on the three following nights. This it is said is condonation of the adultery on the 26th of January, if that should be held to be proved. Now, in order to infer condonation from subsequent cohabitation, the condoner must be proved to have had not merely knowledge of the facts, but also a reasonable probability that he will be able to prove the adultery. The pursuer had not such knowledge on the 27th, 28th and 29th of January; and it was only after he had got the legal opinion from the Glasgow writer, that he found himself in the position to break up matrimonial cohabitation."

The Lord Ordinary then expressed his opinion, that the claim for damages against the co-defender could only be sought on ground of the adultery condoned, and that application was now too late. The Lord Ordinary, however, was of opinion that it was quite compatible with forgiving a repentant wife to demand reparation from the man who has brought dishonour both upon her and upon her husband, and has diminished the happiness of both. But such a claim should be raised immediately on the condonation.

(1) LORD YOUNG:—"The argument to us related to these three questions: 1st, Whether the act of adultery alleged to have been committed in the mason's shed is proved? 2nd, Whether condonation of adultery (cohabitation following) is conditional at common law, or may be made so by express paction, so that it will be forfeited by breach of the condition? And, assuming an affirmative answer on either head, then 3rd, Whether the defender has forfeited the condonation by a breach of the condition legally or pactionally attached to it."

[His Lordship then said that he agreed with Lord Fraser that adultery was not committed on the 26th of January, 1882, and continued]:—

"On the second question argued to us, I am of opinion that condonation of adultery (cohabitation following) is not conditional by our common law, but absolute. The language of our text-writers and judges is to this effect, and although the doctrine of such condonation has been long familiar and acted on in this country, none of our authorities suggest that it is or may be accompanied by a condition. I think this is a weighty argument, notwithstanding the fact that no actual case has been found in which conditionality was pleaded and judicially rejected or allowed, for all our judicial language, including that of our text-writers, is exclusive of the notion of condition-

1883. Nov. 27, 28. *The Solicitor-General for Scotland* (*Asher*, Q.C.) and *Searle* (with them *Inderwick*, Q.C.), submitted that although adultery on the 26th of January, 1882, was not

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ality—absoluteness being the import of all of it. I am, therefore, indisposed now to regard it as an open question. That it has not hitherto been stated and judgment asked on it is sufficiently accounted for by the fact that no Scotch lawyer has regarded condonation for adultery as other than absolute by our law, exactly as it is by the Canon Law. But, if it is fitting that I should consider the reason and policy or public utility of our rule as we have certainly heretofore regarded it, I must say that I think it is well founded on these considerations. It is, in my judgment, *unfitting on public or moral grounds* that a man should knowingly take an adulterous wife back to his bed on any other footing than absolute forgiveness of the past. I have pointed out, and indeed this case illustrates, that her past transgressions, though condoned, may be used in evidence of a subsequent transgression as throwing light on the facts relied on to prove it, but beyond this I find no reason why her forgiven offences may be brought against her judicially. Subsequent adultery may well be presumed and so held proved against her by evidence which, but for her previous conduct, would have been properly thought insufficient. But if with all the aid that can legitimately be taken from her past conduct, the alleged subsequent adultery is not proved or disproved, I cannot assent to the proposition as reasonable or useful that she may nevertheless be divorced if the evidence which does not prove, or even disproves adultery, shews imprudence or levity of conduct on her part. To hold this would be to hold that a man who knowingly and forgivingly resumes cohabitation with an adulterous wife, may thereafter have her divorced for imprudence or levity of conduct, that being in law the condition of their cohabitation. This result is not varied or disguised by saying that she is not divorced for the levity but for the adultery, the forgiveness of which her levity has forfeited.

"I ought, perhaps, to observe that cruelty stands on quite another ground. Cruelty is cumulative, admitting of degrees and augmenting by addition, so that it may be condoned and even forgiven for a time and up to a certain point without any bar in sense or reason to bringing it forward when the continuance of it has rendered it no longer condonable.

"I am further of opinion that condonation of adultery cannot be made conditional by paction; and, indeed, the observations which I have made upon the subject of a legally-implied condition apply equally, and in some respects more strongly, to a conventional condition. There is no authority for admitting it, and all considerations of reason, policy, and utility are, I think, against it. When the case was formerly before us, I had occasion to consider and express my dissent from the Lord Ordinary's opinion, that an injured husband being free to forgive his wife or not, may attach such terms and conditions as he pleases to his forgiveness. In the note to the interlocutor now before us his Lordship repeats his opinion, with the qualification that the condition may not be 'absurd or fantasestablished beyond doubt, the evidence proved (1.) that Mr. Collins did attach a condition to his forgiveness of the previous acts of adultery; (2.) that the renewal of personal communications with

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tical.' But a money payment is neither absurd nor fantastical; and I venture to ask whether a husband could adject that as a condition of condoning his wife's adultery, so that on failure of payment when the term came he should be permitted to revoke the condonation for breach of condition. The true view, I think, is, that forgiving and resuming cohabitation with a guilty wife is not a mere private affair, but one of some public concern, and so not subject to such pactional conditions and terms as people may lawfully make in their private personal dealings. The public law of marriage and of the marriage relation is concerned. The conventional condition here alleged is that the defender 'should never again speak or write to the co-defender.' I think this was a very reasonable condition to adject, and one which ought to have affected the wife's conscience and feelings, whether expressed or not. That it was expressed does not, in my opinion, affect the legal position of the parties.

"On the *third* question, which, according to the views which I have expressed on the second, is merely hypothetical, I do not think it necessary to enter. The inclination of my opinion on it may possibly be inferred from my observations on the first.

"I ought, perhaps, to notice the fact which was a good deal relied on by the defender, that the pursuer continued to cohabit with her and treat her as his wife in the knowledge communicated to him by the detective whom he employed, that she had met the co-defender, and walked with him, and particularly in the knowledge of their walk together alone on the 26th of January, 1882. I agree with the Lord Ordinary that no condonation of adultery on the 26th of January, had such been proved, could thence have been inferred. But with respect to the impropriety or levity of conduct, or the meeting with and speaking to the co-defender relied on as forfeiting the condonation of adultery prior to the 27th of July, 1881, the matter may stand differently. I do not pursue this topic beyond observing that the pursuer's conduct in continuing his cohabitation with the defender, with the knowledge I have referred to, seems to shew that he at first regarded her behaviour in the same light as the Lord Ordinary has done after full investigation. It is certainly the most honourable explanation of his conduct, and therefore probably the true one.

Lord Craighill and Lord Rutherfurd Clark entirely concurred.

The Lord Justice Clerk said:—"In the result of Lord Young's opinion I entirely concur. I am of opinion, in the first place, that the alleged recent act of adultery has not been proved, and secondly, that the former adultery, which had been condoned, cannot again form the subject of an action of divorce, and that upon the ground that according to our law condonation is absolute. I should not have done more than express my concurrence in the proposed judgment, but for the fact that one or two matters are referred to in Lord Young's opinion on

Eayres by the respondent were not for the purpose she alleged, to obtain back her ring and correspondence, but for the criminal intention to resume immoral intercourse, which intention was only foiled through the knowledge that they were watched and the want of an opportunity. Then, on these facts arose the questions of law: whether every condonation of *itself* imports a condition, or, if not, whether it was competent to attach a condition to forgiveness; and if the condition here competently made, whether if a reasonable condition Mrs. Collins was guilty of such a breach as revived the condoned adultery? The judges in the Court below were all of opinion that condonation was absolute, but on different grounds. The Appellant submitted that forgiveness may be displaced on subsequent misconduct,

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which I hold very strong views. First, although I hold that the alleged recent adultery has not been proved, I do not proceed on the considerations which have been adduced as palliating the behaviour of the defender and co-defender. That behaviour I look upon as most heartless on the part of both. It is, in my opinion, of no avail for the co-defender to say that he was unwilling to renew their intimacy, and the wife's explanation of her conduct did not impress me with its truth—on the contrary, I am impressed with its want of truth. The sole ground on which I proceed is that no act of adultery is proved to have taken place on the single occasion libelled. As to whether, according to the law of Scotland, condonation is or can be conditional, I agree with Lord Young. The views on this matter which have been accepted in the law of England are of recent adoption and of recent growth, and on sound juridical principle and social expediency, I am of opinion that the old Canon Law supplies us with the more reasonable rule. Another question was argued to us, and I merely advert to it that it may not be supposed that we are giving judgment upon it. I should not have been prepared to hold that cohabitation for two or three days, pending inquiry into the true state of the facts, would have excluded the husband, in such circumstances as those now before us, from founding on the misconduct of the wife as a revocation of the condonation, had we been prepared to adopt the English rule.

"With these explanations, I agree with your Lordships that we should adhere to the Lord Ordinary's judgment."

LORD YOUNG:—"I meant to bring this under your notice, but perhaps you will allow me to do it now—whether, consistently with the Lord Ordinary's judgment, and with that which will now be the judgment of the Court, it is fitting that there should be a judicial finding that the condoned acts of adultery are proved. I think it is better without that."

LORD JUSTICE CLERK:—"Yes, and with that variation we shall adhere."

which misconduct would not of itself be successful in a decree of adultery. No actual authority in the law of Scotland was founded on in the Court below, see Lord Young (1); but the English decisions upheld the appellant's contention. [LORD WATSON:—Does not the Scotch law proceed on the canon law unless displaced?] When any old custom was in doubt great weight was to be attached to the canon law, but not strictly followed: see Stair, Inst. bk. 1, tit. 4, ss. 6 to 16; Erskine, 1, 1, 42. In *Lockyer* v. *Ferryman* (2), a question of declarator of marriage, the Lord Justice-Clerk said, speaking of the Pontifical law: "I had thought it had been well settled, first, that it never was adopted in its integrity, even in Catholic times; secondly, that since the Reformation, while our consistorial law has been necessarily built on the broad lines of the canon law, we have adopted its principles and maxims only as we have adopted those of the civil law,—we have done so in so far as these appear to be just and equitable, and consonant to the general spirit of our jurisprudence, and no farther." They submitted that the relation of the canon law to Scotch law is the same as the relation of the canon law to English law. The quotations from text-writers in the Courts below did not apply. The Lord Ordinary said that in France the rule as laid down by Pothier, Traité du Mariage, art. 520, was altered by the Code Civil. [LORD WATSON:—I cannot agree to that. LORD BLACKBURN:—The Code Civil reiterated it and reaffirmed it. EARL OF SELBORNE, L.C.:—I also think the canon law was brought in to aid the civil.] Even if the Court below were right in considering themselves bound by the text-writers to whom they refer, the question now coming up for decision for the first time, it is competent to this House to declare that the law of Scotland is in accordance with the law of England on the doctrine of condonation, and that by the law of both countries condonation is not absolute but conditional. There was nothing in the law of Scotland to prevent the English cases on this point having effect. The doctrine as enunciated in these cases was that condonation was forgiveness with an implied condition. In *Durant* v. *Durant*,

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(1) *Ante*, p. 219.

(2) June 28, 1876. 3 Court Sess. Cas. 4th Series, at p. 894.

1825 (1), Sir John Nicholl said: "If nothing but clear proof of actual adultery will do away with condonation of adultery, the rule of revival becomes nearly useless, for the revival is unnecessary." See also *Bramwell* v. *Bramwell* (Jan. 26, 1831) (2) where the facts were extremely like this, and the remarks of Dr. Lushington were completely in the appellant's favour (3). In *Palmer* v. *Palmer* (May 24, 1860) (4) the wife petitioned for a divorce. It was held that subsequent adultery revived condoned cruelty. In *Dent* v. *Dent* (July 14, 1865) (5) held that condonation had the same effect that it had under the Ecclesiastical Court; and condoned adultery was held to be revived by subsequent cruelty. See Lord Penzance's directions to the jury (5). It has also been held that the wife's right to have the marriage dissolved on the ground of incestuous adultery which had been condoned may be revived by adultery which is not incestuous: *Newsome* v. *Newsome* (June 6, 1871) (6). That desertion for two years followed by cohabitation may be revived by subsequent adultery: *Blandford* v. *Blandford* (Feb. 10, 1883) (7). *Rowley* v. *Rowley* (1866) (8) is a case shewing how far the law will favour a contract not in degradation but in favour of marriage. In a suit for dissolution of marriage; both parties agreed to execute a deed of separation as a compromise. It was held, that misconduct by the husband after the agreement had not the effect of reviving the wife's remedies as in the case of condonation, and, consequently, that she was precluded from suing on any facts anterior to the compromise. But Lord Chelmsford's remarks were of importance, "The learned Judge Ordinary very properly rejected the supposed analogy between this case and a case of condonation. In the latter case there is a conditional forgiveness; here there was an absolute release" (9). See also *Winscom* v. *Winscom and Plowden* (Feb. 9, 1864) (10) for an opinion to the same effect. There Lord

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(1) 1 Hagg. Ecc. R. at p. 761; see for Sir John Nicholl's full opinion on this point, *post*, p. 237.

(2) 3 Hagg. Ecc. Cas. 619, at pp. 629, 631.

(3) See note, *ante*, p. 214.

(4) 2 Sw. & Tr. 61.

(5) 34 L. J. (P. M. & A.) 118; 4 Swa. & Tr. at p. 106. See *post*, p. 240.

(6) Law Rep. 2 P. & D. 306.

(7) Law Rep. 8 P. D. 19.

(8) Law Rep. 1 H. L., Sc. 63.

(9) Ibid. at p. 68.

(10) 2 Sw. & Tr. 380.

Penzance said, "If the petitioner had taken a different course he might probably have entitled himself to relief from the Court, for it is alleged that his wife had, in 1853, been guilty of adultery with a person named Clark, which he had condoned. But condonation would hardly have been an answer to a suit founded on that adultery in the face of these familiarities with Lieutenant Plowden had he not condoned them also. It is not necessary to decide the point; but, as at present advised, I am of opinion that this latter misconduct would have enured to revive the original guilt, if that had been made out to the satisfaction of the Court" (1). [LORD BLACKBURN:—The English cases do not come to more than judicial dicta.] Cruelty in Scotland gives divorce mensa et thoro, and it was not doubted that in the law of Scotland condoned cruelty can be revived. There was nothing in reason or public utility that condonation should not be conditional. [EARL OF SELBORNE, L.C:—Suppose children born after the condoned adultery: is it right that the husband should be able to go back to the misconduct before their birth to get a divorce?] Nothing could be more reasonable than that a husband who found out the adultery of his wife should say "I will not cast you off, I am willing that cohabitation should be resumed; but if your conduct tends to the same conduct as before then I may go back to the old offence." The principle was the same in cases of adultery as of cruelty. It was the same condonation proceeding on repentance. No doubt Lord Fullerton, in *Macfarlane* v. *Macfarlane* (Feb. 7, 1849), said that there was no analogy between condonation of adultery and condonation of cruelty. But that doctrine they controverted. His Lordship then proceeds to say, "After a series of previous outrages a much slighter degree of violence will justify a demand for final separation" (2). See also *Sinton* v. *Irvine* (Feb. 15, 1833) (3) and *Graham* v. *Graham* (July 19, 1878 (4).

There was nothing in the appellant's contention as to revival of the condoned adultery against principle. A case of a husband forgiving his wife on the condition that she does not consort again with her paramour, and the wife doing so, and thus causing the condoned adultery to revive, was not more against public policy than the case where cruelty subsequent to the condoned adultery revived that adultery.

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(1) 3 Sw. & Tr. at p. 383.

(2) 11 Court Sess. Cas. 2nd Series, at p. 541.

(3) 11 Court Sess. Cas. 1st Series, 402.

(4) 5 Ibid. 4th Series, 1093.

Suppose an absolute condonation, then the appellant's wife, at least according to English law, may meet the paramour in the husband's own house, and yet he has no remedy. As the law is at present she can sue him for restitution of conjugal rights, and she can compel him to live with her. As to sleeping with the respondent from the 26th to the 29th of January, that was explained by the fact that no distinct act of adultery was reported by the detective, and the appellant was considering the meaning and consequence of these meetings. They submitted, the respondent having resumed intercourse with her paramour, that alone revived the previous condoned adultery. It would be the same if the intercourse such as proved here had been, not with her paramour but with another man. [Also quoted Bishop on Marriage, vol. ii. sect. 63; *Watson* v. *Watson* (November 18, 1874) (1).]

Sir *F. Herschell*, S.G., and *J. P. B. Robertson*, maintained for the respondent:—

There was no case in Scotch law where subsequent misconduct has revived condoned adultery. There must have been such a case if the appellant's contention is the law. But according to all the text-writers condonation in full knowledge implies a remissio injuriæ as regards the adultery, and that this remissio is ex lege absolute, and cannot be made conditional by any arrangement between the parties. The Scotch law follows the canon law: see Lord Justice-Clerk Hope, p. 203, of Bell's case of legitimacy: "In all questions of marriage and legitimacy, the canon law is the law of Scotland." And Lord Meadowbank, p. 225: "There is no sort of doubt that the canon law is one of the fontes juris Scotiæ." There has never been any doubt in the law of Scotland on the absolute nature of condonation of adultery (2).

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(1) 12 Scot. Law Rep. 78.

(3) See Balfour, Practicks, p. 99; *Watson* v. *Cruikshank* (July 15, 1681), Mor. Dic. 330; *Leslie* v. *Nairn* (1712), Lothian Prac. 164; *Anonymous Case* (Jan. 26, 1758), Brown Sup. vol. v. p.

The rule is well founded on public and moral grounds and on definite principles, and has obtained a distinct and settled development in the law of Scotland, and always has been so stated in text-writers: Erskine, 1, 6, 43, et seq. See cases of *Macfarlane* v. *Macfarlane* (Lord Fullerton) (1), *Graham* v. *Graham* (2), and *Watson* v. *Watson* (3).

Since the Reformation divorce à vinculo has been allowed in Scotland for adultery (4). The Consistory Court, or Curia Christianitatis, was the direct successor of the Pope's bishop's Court (5), and administered, until abolished by the statute 1 Will. 4, c. 69, sect. 33 (1830), the marriage law. And the statutes of 1560 and 1567, which abolished the Pope's authority, import that where the canon law is not expressly rejected it is left standing (6). Scotch law stands historically on a basis wholly outside the English law. To cite, therefore, English cases of a date when divorce à mensa et thoro was the only remedy the English Courts could grant, is to refer to decisions which are wholly inapplicable. But at the most, the English cases cited only laid down the doctrine that on a matrimonial offence being committed it revived the

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863; *Lockhart* v. *Henderson* (Dec. 7, 1799), Mor. 341; *Duncan* v. *Maitland* (March 9, 1809), 15 Fac. Col. 246; *Fairlie* v. *Fairlie* (July 3, 1815), 6 Pat. Ap. C. 121.

(1) 11 Court Sess. Cas. 2nd Series, at p. 541.

(2) 5 Court Sess. Cas. 4th Series, 1093.

(3) 12 Scot. Law Rep. 78.

(4) There are one or two cases which seemed to imply that divorce à vinculo was allowed in Scotland for adultery before the Reformation, but these cases on examination have proved to be cases of nullity or separation à mensa et thoro. See Balfour's Practicks, pp. 97, 99; 1 t. c. 616; see also Act 1551, c. 19; Skene, p. 139; but see Lord Watson, *post*, p. 245. The first cases deciding that adultery was a lawful cause of divorce after the Reformation seem to be *Johne Chalmer* v. *Agnes Lumisdene* (Dec. 19, 1560); *Jeane Lyell* v. *William Montgomerie* (Jan. 21, 1561), 1 t. c. 1239.

(5) See Mackenzie's Inst. (1694 Ed.), pp. 3, 31; Lothian's Prac. 13; Fergusson, Cons. Law xv.

(6) 2 Thomson, Acts, p. 526; 3 Thomson, Acts, p. 14; and Skene's Acts, 1 Par James 6, Act 31. See also Forbes Inst. (1722, ed.), vol. i. p. 10. The canon law is owned to be our common law by the same statutes that establish the authority of the civil law in so far as our own municipal law has not receded from it, or it does not clash with sound religion, see Act 1540, parl. 6 James 5, Act 80; 1551, 5th parl. of Queen Mary, Act 22.

condoned acts: see the earlier cases of *D'Aguilar* v. *D'Aguilar* (1) and *Worsley* v. *Worsley* (2).

They submitted all the English decisions amounted to was, that previous condoned acts may be proved to throw light on the subsequent acts. [EARL OF SELBORNE, L.C.:—I do not agree with Lord Penzance that in law a condition is imported into the condonation (3).] But even if the English cases did apply, and were as stated by the appellant, the condition here, if there was one, was not broken, and it was not an offence which could be taken cognizance of by a Matrimonial Court. The evidence proved that the respondent did not meet Eayres with any wrong intention. On the contrary, it was to secure herself and her husband alike from dishonour and annoyance, which the possession of her letters by Eayres put it into Eayres' power to inflict upon them.

Also, the appellant continuing cohabitation from the 26th to the 29th with his wife in full knowledge of the whole circumstances on which he founds this action, must be held, according to ordinary rules of law, to have condoned them, and to be barred from founding on them, either as in themselves sufficient to claim divorce; or as constituting such conjugal misconduct as entitles him to revoke the pardon he had given in the previous summer.

The Solicitor-General for Scotland, in reply:—

If condonation can be qualified, surely this is a case where qualification should be inferred.

The House took time for consideration:—

Feb. 18. LORD BLACKBURN:—

The interlocutor appealed against does not pronounce any deliverance as to the custody of the children, but "reserves power to either party to make application to the Court with reference thereto in this process, in the event of the pursuer and defender not again cohabiting as husband and wife." Should such an application be made, it may be necessary to inquire further as to a fact, as to which the Lord Ordinary and the Lord Justice-Clerk are not agreed. If the object and intention with which the wife, as is admitted, made appointments against her husband's wish, and as she supposed, without his knowledge, was what the Lord Ordinary believes, her conduct was, I think, very reprehensible. If it was with the object and purpose which the Lord Justice-Clerk believes, it was very much more reprehensible. I do not think it proper now to express any opinion either one way or the other on a question not by this appeal brought before this House, and which may be raised hereafter.

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(1) 1794, 1 Hagg. Ecc. Rep. 773.

(2) 1730, note to *Durant* v. *Durant*, 1 Hagg. Ecc. Rep. 734.

(3) See directions to jury on the question of condonation in *Dent* v. *Dent* (1865), 34 L. J. (P. M. & Ad.) 118; 4 Sw. & Tr. 106.

It is admitted, both on the record and on the evidence, that there was repeated adultery, and it is not doubted that, by the law of Scotland, the injured spouse had a right to obtain a divorce for adultery. It is also admitted, both on the record and on the evidence, that the injured husband condoned that adultery, that is, with full knowledge of the previous acts of adultery, chose not to enforce his right to divorce his wife, but freely elected, as he had a right to do, to forgive her, and resumed conjugal intercourse, or rather never ceased to live with her and treat her as his wife; it is not doubted that, having done so, he could not after such condonation apply for a divorce against her, unless there was some subsequent misconduct by the wife; and as, in this case, from July, 1881, to the month of November, 1881, no fresh misconduct of any kind is imputed to her, there was a period of some months during which no action for a divorce could have been successfully maintained, the condonation being a complete bar to such an action.

It was alleged by the pursuer that there was fresh adultery committed on the 26th of January, 1882; and it was not doubted that if this had been proved the previous condonation of previous adultery would have been no bar to an action for a divorce for that fresh adultery. But all the judges in the Court below were of opinion that this fresh adultery, as laid, was not proved; and the counsel for the appellant, at your Lordships' bar, did not ask your Lordships to find that such fresh adultery was proved. But it was contended that though adultery was not proved, yet that misconduct, subsequent to the condonation, was proved; and that, it was contended, was sufficient to prevent the condonation from being a bar. It was said that condonation was always conditional, and that when a release was subject to a condition resolutive, the condition being broken, the release was no longer operative. The interlocutor appealed against lays it down that by the law of Scotland a condonation (that is, I take it, a condonation of adultery such as I have already defined it) is by law absolute.

I have had the great advantage of perusing in print Lord Watson's opinion, which collects all that is to be found in the Scotch law authorities. I think that, as the law of Scotland is greatly founded on the old canon law, that canon law itself and the law of other countries, such as England, which have with more or less modification adopted the canon law, are not to be rejected as authorities as to the law of Scotland. I do not think them, however, of equal weight with the Scotch authorities. I would refer to what I said in this House in *Mackonochie* v. *Penzance* (1), where I restated what I thought had been the view of Lord Stowell in *Dalrymple* v. *Dalrymple* (2) as to the weight of authorities.

I think it is important to remember that there was a great alteration made in the sixteenth century in the Scotch law, not only as to the mode of administering the marriage law, but also in one very important point in its substance.

Before the Reformation, in Scotland, and I may say throughout Europe, the marriage tie was considered indissoluble. The Ecclesiastical Courts exercised and enforced by ecclesiastical censures a jurisdiction to compel a spouse, whether husband or wife, to live with and treat with matrimonial kindness his or her spouse; and also relieved an innocent spouse from any obligation to live with a spouse guilty of conduct such as to make it right so to relieve the innocent spouse. This was regulated by the canon law; but no conduct, however bad, relieved the innocent spouse from the matrimonial tie, or enabled him or her to marry again as if the guilty spouse were dead.

(1) 6 App. Cas. 446.

(2) 2 Hagg. Cons. Rep. 81.

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But the law of Scotland was, by various Acts which are mentioned in Lord Watson's opinion, changed in this respect. There was a power given by process of law to obtain in a proper case a divorce so as to entitle the party obtaining it to live single, or marry as if the marriage had never been, or as if the other spouse were naturally dead. This could be done when the divorced spouse had committed adultery so as to forfeit all his or her rights, interest, or privileges as the lawful spouse of the pursuer.

I should, perhaps, mention that there was also a power introduced to get a dissolution of a marriage in case of wilful and persistent desertion, but that has no bearing on the question now before this House. With that exception, divorce à vinculo was granted only in case of adultery, which was viewed by a strong religious party in the Scotch reformed clergy as a very great crime. The Act of 1563, c. 19, cited by Lord Watson, shews that the Scotch legislature was willing to go far in complying with this view; and it also shews that "the right of any party to pursue for divorcement for the crime of adultery before committed, conformable to the law" was established as part of the law of Scotland as early as 1563. There was no such power in England until an analogous power was created by the statute 20 & 21 Vict. c. 85, ss. 27–29, A.D. 1857.

All jurisdiction which (before the Reformation) was exercised by the Ecclesiastical Courts was, in Scotland, transferred to commissaries, who acted under the control of the Court of Session. If any matrimonial wrong other than adultery was done, for which it was thought right to retain a remedy, the lay Court gave the appropriate redress, whatever it might be; in general, the extent of redress would be much dependent on the gravity of the offence proved. In no case could it amount to divorce from the matrimonial tie. It seems now settled, that in case of adultery the injured spouse is not confined to the new remedy of divorce à vinculo, but may sue as of old for separation.

In England, until the 20 & 21 Vict. c. 85, the remedy was still to be sought in the Ecclesiastical Courts, who gave the proper redress. In neither country, however great the amount of cruelty was with which one spouse (whether husband or wife) treated the other, could either the lay Court in Scotland, or the Ecclesiastical Courts in England, dissolve the marriage and give leave to the maltreated spouse to marry. In Scotland, adultery was a sine quâ non; in England, even with adultery, there could not till the recent Act be such a divorce, and there never was such a power at all under the old canon law.

It is therefore to the law of Scotland that we must look to see what the right was, first created at about the time of the Reformation, and worked into its existing shape during the course of more than three centuries. I do not doubt that, as Lord Stair says (Institutes, book 1, title 1, s. 14), the canon law was so deeply rooted that, even in such a matter as this, in which the canon law was totally departed from, consideration was from the beginning given to the canon law, "as containing many equitable and profitable laws which, because of their weighty matter and their being once received, may more fitly be retained than rejected." Even now, if any principle to be found in the canon law has been worked out in modern English jurisprudence, or any foreign jurisprudence founded on the canon law, so as to come to an approved result, I think it is not to be too hastily assumed that the result has been rejected by the Scotch law. The same considerations which have led to its being retained and adopted in the English or foreign jurisprudence may shew that it ought to have been retained in Scotch law, and if it be not clear on the Scotch authorities that it has been before now rejected, it may be proper even now to adopt it. But where the course of Scotch precedent and authority is such as to shew that during centuries the Scotch law has rejected any such doctrine, it is not, I think, competent for this House to change that existing law, even if convinced that the change would be beneficial.

The doctrine of condonation was one of those which the law of Scotland did retain from the canon law. It is in itself obviously both just and politic that a spouse (whether male or female) who has become fully aware of the misconduct of the other spouse, and has elected to forgive it, should not be permitted to treat the other as a spouse and to live together and yet to reserve a power to fall back upon the by-gone forgiven offence as a substantive ground for redress. I think it is clear, on principle, that such a condonation, accompanied by cohabitation, ought to have the effect of being a complete release and be a bar to any action in respect of that wrong which has been forgiven, and, therefore, that no action can be brought except in respect of some wrong either subsequent to that condoned, or, what comes to the same thing, not known to the condoning spouse, and neither intended to be, nor reasonably supposed by the forgiven spouse to be, included in the release. But it seems equally clear, on principle and authority, that there may be redress given in respect of such subsequent wrong.

The Lord Ordinary states the canon law to be, that not only did such a condonation amount to a complete bar to the right to seek for a remedy for the condoned wrong, which I think the authorities fully bear out, but that it "completely extinguished" the condoned offence, and that it could not be referred to for any purpose whatever. He treats it as if, at the time of the reconciliation, a new marriage had been entered into and the old offences not only forgiven and released, but entirely extinguished and as if they had never been. Though, as Maule, J., said in *Mayor of Berwick* v. *Oswald* (1), "it is beyond the power of the Courts, or of an Act of Parliament, to recall a day that has passed, or make a thing that has happened not have happened" (2), it is not beyond them to say that the condoning party shall be precluded from, for any purpose whatever, saying that they had ever been; and the Lord Ordinary thinks that the canon law has done this. This is a very artificial doctrine, not, I think, borne out by the passages which he quotes from the canonists, and the judges of the Second Division did not assent to this. They decided by their judgment of the 16th of May, 1882, that it was perfectly competent for the parties to bring before the Court the whole conduct of the spouse and her alleged paramour before condonation, to enable the Court to determine what was the extent of their misconduct after condonation. This judgment of the 16th of May, 1882, has not been brought up on appeal, but if it had been so brought up, I see no ground either on principle or authority for questioning it.

(1) 3 E. & B. 670.

(2) Hor. III., Carm. 29, 45.

That judgment did not determine what amount or kind of subsequent misconduct was necessary to justify a divorce à vinculo. The interlocutor now appealed from determines that it must be subsequent adultery and no less.

I think, on principle, a reconciliation being entered into with full knowledge of the guilt and with the free deliberate intention to forgive it, where that reconciliation is followed up by cohabitation and living together as man and wife, the status of the couple ought to be the same and not more precarious than if there was a new marriage entered into; and, if so, then it would, I think, follow that where the redress sought is a divorce as if the erring spouse were dead, it must be necessary to prove adultery subsequent to the condonation which has the effect of a new marriage. I have had the very great advantage of reading the opinion of Lord Watson, and I think that the effect of the Scotch authorities he cites is that the status of a couple after condonation and cohabitation is the same as if there was then for the first time a marriage. I think the result is, as he says, that the authorities which he cites establishes that, for at least two centuries, the effect attributed by the law of Scotland to full condonation of adultery is that it affords an absolute bar to any action of divorce founded on the condoned acts of adultery. If there was proof of adultery after the condonation, that, like proof of adultery after a new marriage at the date of the condonation, would no doubt have supported the pursuer's case; but I am considering the case on the hypothesis that no actual adultery was proved subsequent to the condonation, which is admitted, in July, 1881.

The Lord Ordinary says:—"The doctrine of condonation of adultery is derived in Scotland from the canon law, which was the law administered in this country in this class of cases (except in so far as altered by statute) both before the Reformation and ever since. That law was simply this, that if one spouse condoned the adultery of another, the offence was entirely extinguished. It could not be referred to, notwithstanding the subsequent misconduct of the erring spouse. The case was the same as if a new marriage had been entered into." On this I have already remarked. He goes on:—"It was a matter entirely within the power of the innocent spouse to condone the offence, or to insist for the remedy which the law allowed—separation or divorce; and being entirely within his right, the Lord Ordinary is of opinion that he was entitled to adject any reasonable condition to his condonation. He was not of course entitled to adject absurd or fantastical conditions. But the matter being for him to forgive or to refuse forgiveness, it does not seem to be unreasonable for him to stipulate that the condonation should only have effect on the condition that intercourse with the paramour should for ever cease." It is true that he finds as a fact that no such condition was by paction added to this quasi new marriage; but I cannot think a condition that the status of the condoned spouse should be more precarious than that of an ordinary spouse could be valid or effectual. I do not see how it could be consistent with the relation of married persons that there should be a power to divorce for any other cause but that one which the law allows, viz., adultery.

I am not satisfied, either on principle or on authority, that the law of condonation is the same with respect to all matrimonial offences as it is as to adultery. Adultery is a positive fact; either there is adultery or there is not. If there is, subject to any question that may be raised as to condonation, connivance, recrimination, or any other answer, there is an absolute right to a divorce.

Where the remedy which the law allows is not divorce, but at most separation, an action for a subsequent wrong which would give rise to the same remedy is clearly not barred by the previous forgiveness. And as the question whether there ought to be a separation in general depends upon the amount and degree of the offence proved, and not merely on its species, I do not see that there is any obvious reason why the previous conduct of the parties before the condonation should not be taken into account in order to determine what is the gravity of the offence proved. It seems to me not unreasonable to say that, if there has been forbearance and forgiveness, and after that the erring spouse commits any breach of duty (whether adultery or a less grave offence), the offence is more aggravated than when committed against a spouse who has not the additional claim on the duty arising from such forbearance. That consideration cannot convert cruelty into adultery; nor even convert solicitation of chastity into adultery; but it might reasonably enough justify the spouse who had already forgiven so much in refusing to forgive more, and make it fit in an ecclesiastical judge who acted pro salute animæ, to abandon all attempts to reconcile the parties, though the acts proved subsequent to the condonation were not in themselves (but for what had gone before) such as to render a separation necessary.

Where separation is sought for cruelty this is decided. In *Macfarlane* v. *Macfarlane* (1) the decision was that when a husband had repeatedly beaten and ill-used his wife, and she had fled from him, and been persuaded to return and live with him again as his wife, she was not, on his again ill-treating her, confined, when seeking for a separation, to those acts of cruelty which were subsequent to her not living with him. It is put on the ground that condonation effaced, as grounds of action, all previous breaches of the marriage law, or, in other words, was an absolute release to an action for divorce for adultery, but that, "in an action like the present, a return to domestic society, has no such effect. It is in its nature conditional, and dependent on the permanent forbearance from those acts of violence by the party who had formerly been guilty of them."

In *Graham* v. *Graham* (2), the Lord President says, "It is quite true that the wife condoned these acts of violence by coming back to him. But I am not sure that 'condone' is a very happy expression, because it leads one to think of the kind of condonation applicable to divorce for adultery. When an act of adultery has been condoned it is wiped out, and can never be referred to again, just as if it had never taken place; but it is not so in an action of separation on the ground of violence. When a wife comes into Court to complain that she cannot live with her husband because of acts of violence to her, and of a course of conduct that has placed her life or health in danger, she thereby opens up an inquiry into the whole history of her married life. Although acts of violence committed at an earlier period, and which have not prevented her from living with him, or going back to him after they have been separated, cannot be made the sole foundation of an action of separation, they may form the subject of investigation and proof, with a view to determine what is the true issue in the case, whether the wife can with safety to person and health live with him now."

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(1) 11 Court Sess. Cas. 2nd Series, 533, at p. 541.

(2) 5 Court Sess. Cas. 4th Series, at p. 1095.

This is a different, and I cannot but think a more solid ground than the fiction of a condition. It comes, however, to the same result.

No Scotch authority was cited for the appellant, who relied entirely on English decisions. Most of those cited were in the English Ecclesiastical Courts, which could not have at all considered the question whether it was right to make the status of married persons living together after condonation more precarious, more subject to be dissolved, than it was before; for, according to the law which the Ecclesiastical Courts of England administered, there could not be a divorce à vinculo for any cause whatever.

It is true that in several cases which have been cited, the Court not only acted on the ground that where the cause for which a separation was sought was subsequent to condoned adultery, it was much graver than if there had not been such forgiven adultery, but have expressed as their reason for it that condonation was conditional, and that a breach of the condition revived the adultery. And in *Durant* v. *Durant* (1), Sir John Nicholl, after saying that it was unnecessary to decide upon the point, as he was satisfied that adultery subsequent to the established condonation was proved, expresses an opinion which is, no doubt, a weighty authority, though not a decision. He went very far in his language. He says: "If nothing but clear proof of actual adultery will do away with condonation of adultery, the rule of revival becomes nearly useless, for the revival is unnecessary. The only possible way in which the former adultery could bear would be in, possibly, inducing the Court to give some slight additional alimony: but it could not bear even in that way when the suit is brought by the husband; in which case, of course, there would be no question of permanent alimony. It appears, therefore, hardly to be consistent with common sense, that clear proof of an actual fact of subsequent adultery should be necessary to remove the bar: something short would be sufficient, and it seemed almost admitted, though no direct authority was adduced in support of the position, that solicitation of chastity would remove the effect of condonation of adultery, but still it was maintained that it must be an 'injury ejusdem generis.' It is difficult to accede to the good sense even of that principle, or to suppose that the implied condition upon which the forgiveness takes place could be: 'You may treat me with every degree of insult and harshness—nay, with actual cruelty, and I bar myself from all remedy for your profligate adultery—only do not again commit adultery or anything tending to adultery:' the result of the argument is, that this must be supposed to be the condition implied when condonation of adultery takes place. The plainer reason and the good sense of the implied condition is, that 'you shall not only abstain from adultery, but shall in future treat me—in every respect treat me (to use the words of the law) "with conjugal kindness"—on this condition I will overlook the past injuries you have done me.' This principle, however, does not rest wholly on its own apparent good sense, but the Court has authority to support it. It has been held that cruelty will revive adultery" (1).

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(1) 1 Hagg. Ecc. 733, at p. 761.

If this language is to be taken without qualification, and followed to its logical result, it would follow that, however long a spouse had, after condoned adultery, lived chastely and in full performance of all that a spouse should do, any lapse, however slight and venial in itself, from duty, revived the old adultery, and obliged, or at least enabled, the Court to decree a separation. This does not seem to me either just or expedient; I doubt if it was meant. No case in the Ecclesiastical Courts was cited in which the ground of complaint was not one which was, from its nature, capable of being aggravated by the previous, though condoned, adultery, and in most, if not all, it was so grave that it might well be a ground for separation, even if not so aggravated, and in *Dent* v. *Dent* (1) to be noticed later, it was such cruelty as, without adultery, would have entitled the petitioner to a divorce à mensa et thoro.

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(1) The cases of *Worsley* v. *Worsley*, 1 Hagg. Ecc. Cas. pp. 734, 764; and *D'Aguilar* v. *D'Aguilar*, 1 Cons. Rep. 134, are referred to.

But, by the recent legislation, 20 & 21 Vict. c. 85, the powers of the Ecclesiastical Court are transferred to a lay Court, which, by sect. 22, in "proceedings other than proceedings to dissolve any marriage," is to act on the principles of the Ecclesiastical Courts. By sect. 27 a proceeding totally new in England is created. It shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said Court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty inter alia of adultery, coupled with such cruelty as without adultery would have entitled her to a divorce à mensa et thoro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

By the 29th and 30th sections upon any such petition for the dissolution of marriage, it shall be the duty of the Court to inquire whether the petitioner has been "in any manner accessory to or conniving at the adultery or has condoned the same," and this applies to husband and wife alike. There is no provision at all as to condonation of the cruelty or desertion which require to be coupled with the adultery in order to entitle the wife to a dissolution of the marriage: whether the law as to condonation is or is not by the canon law, as acted on in England, the same as to cruelty as to adultery, it is not made so by the recent statute.

In *Palmer* v. *Palmer* (2) the Judge Ordinary refused to strike out a paragraph in which the wife, to a plea of condonation, replied "that if she had condoned the respondent's cruelty, such condonation was cancelled, and her right to complain of such cruelty was revived by the respondent's subsequent adultery." And some of the observations reported to have been made, like those of the Court in *Durant* v. *Durant* (1), already cited, are authorities for the doctrine of conditionality of all condonations, whether of adultery or of cruelty, though the decision did not require them.

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(1) 34 L. J. (P. M. & Ad.) 118; 4 Sw. & Tr. 105.

(2) 29 L. J. (P. M. & Ad.) 124; 2 Sw. & Tr. 61.

In *Dent* v. *Dent* (2) the wife petitioned on account of adultery and cruelty. The husband pleaded condonation of the adultery. On the trial it was admitted that there had been adultery in 1861, that it had been condoned in 1861, the parties lived together and had had children. The Judge Ordinary, Lord Penzance, in summing up, is reported to have directed the jury that the rule of law was that all condonation was conditional, and the condition is, "In future you shall treat me as a husband ought to treat his wife; and if you hereafter break your matrimonial obligations, and are guilty of adultery or cruelty, the condoned offence is revived. The question for you is, whether there was any subsequent cruelty which did away with that pardoning or condonation. The pardoning having taken place in 1861, there is evidence that in 1864 the husband was guilty of cruelty. If you are satisfied of that fact, you will find that though the wife did pardon the husband's adultery there was subsequent cruelty committed which revived that adultery. The cruelty must have been, within the 27th section, 'such cruelty as, without adultery, would have entitled her to a divorce à mensa et thoro.'"

This is, I think, the only case reported in which the doctrine of revival has been made the ground on which a divorce à vinculo has been granted, and the strong objection arising from its varying the status of married persons does not seem to have been brought to the notice of the learned judge.

In *Blandford* v. *Blandford* (3) there had been adultery and desertion; there had been a forgiveness of both that adultery and of the desertion, and a resumption of conjugal intercourse for a few months; after which the adultery with the same person was resumed; there was no condonation of that latter adultery, and the question was whether it could be coupled with the previous desertion, though that desertion had ceased before the adultery complained of was committed. This seems to me a very different question from that raised in *Dent* v. *Dent* (1). But it is to be observed that the Judge Ordinary, Sir James Hannen, seems to express approbation of the doctrine laid down in the dictum in *Durant* v. *Durant* (2).

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(1) 1 Hagg. Ecc. 733, at p. 761.

(2) 34 L. J. (P. M. & Ad.) 118; 4 Sw. & Tr. at p. 106.

(3) 8 P. D. 19.

But assuming it to be now established English law that any matrimonial offence, though forgiven, may be revived by any other matrimonial offence of which the Court take cognisance, it is a very modern law, and not, I think, so obviously just and expedient that we ought to infer, contrary to all the Scotch authorities for the last three centuries, that it either was or ought to have been introduced into the law of Scotland in the 16th century.

Lord Young said in this case: "But, if it is fitting that I should consider the reason and policy or public utility of our rule as we have certainly heretofore regarded it, I must say that I think it is well founded on these considerations. It is, in my judgment, unfitting on public or moral grounds that a man should knowingly take an adulterous wife back to his bed on any other footing than absolute forgiveness of the past. I have pointed out, and, indeed, this case illustrates, that her past transgressions, though condoned, may be used in evidence of a subsequent transgression as throwing light on the facts relied on to prove it, but beyond this I find no reason why her forgiven offences may be brought against her judicially. Subsequent adultery may well be presumed and so held proved against her by evidence which, but for her previous conduct, would have been properly thought insufficient. But if with all the aid that can legitimately be taken from her past conduct the alleged subsequent adultery is not proved, or is disproved, I cannot assent to the proposition as reasonable or useful that she may nevertheless be divorced if the evidence, which does not prove or even disproves adultery, shews imprudence or levity of conduct on her part. To hold this would be to hold that a man who knowingly and forgivingly resumes cohabitation with an adulterous wife may thereafter have her divorced for imprudence or levity of conduct, that being in law the condition of their cohabitation. This result is not varied or disguised by saying that she is not divorced for the levity, but for the adultery, the forgiveness of which her levity has forfeited. I ought, perhaps, to observe that cruelty stands on quite another ground. Cruelty is cumulative, admitting of degrees and augmenting by addition, so that it may be condoned and even forgiven for a time and up to a certain point without any bar in sense or reason to bringing it forward when the continuance of it has rendered it no longer condonable."

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(1) 34 L. J. (P. M. & Ad.) 118; 4 Sw. & Tr. 106.

(2) 1 Hagg. Ecc. 733, at p. 761.

This exactly expresses my own opinion. I will not attempt to improve upon the language in which it is expressed. This being so, I advise your Lordships to affirm the interlocutor appealed against, and to dismiss the appeal, and, as it is by a husband against his wife, with costs as between agent and client.

LORD WATSON:—

The appellant was married to the respondent, Mrs. Collins, on the 18th of June, 1872, and four children were born of the marriage prior to July, 1881. In the course of that month the respondent confessed to the appellant that she had, in the year 1881, been guilty of repeated acts of adultery with the other respondent, William Henry Eayres. The appellant forgave these offences, and continued to cohabit with his wife, at bed and board, until the 29th of January, 1882, when he withdrew from her society, and thenceforth ceased to have any intercourse with her. So far, the facts of the case are not in dispute.

The action of divorce, in which the present appeal is taken, was instituted by the appellant on the 4th of February, 1882. The only acts of adultery now relied on by the appellant are those of which he was fully informed by his wife in July, 1881, and which were then condoned by him; but the appellant alleges that he resumed conjugal intercourse, at that time, in pursuance of a verbal pardon, which was qualified by the express condition that his right to dissolve the marriage, in respect of her previous acts of adultery with Mr. Eayres, was to revive, in the event of her either speaking or writing to that person. He also alleges that the respondent repeatedly violated that condition in the month of January, 1882, by correspondence with Mr. Eayres, and by personal interviews with him, in circumstances which, if insufficient to warrant the inference that they actually committed adultery, were, at least, inconsistent with the possibility of the respondent's having been actuated by any legitimate or chaste motive.

The respondent, on the other hand, asserts that no condition whatever was attached to his forgiveness of her matrimonial offences; and she likewise maintains that such a condition, adjected to a conventional pardon, becomes wholly inoperative, should the two parties thereafter live together as husband and wife. She also maintains that, in point of fact, her communications with Mr. Eayres, in January, 1882, however injudicious, were free from any taint of impurity, and consequently that she cannot be held to have violated the condition,—assuming it to be proved and also to be legally binding.

The respondent has been assoilzied from the conclusions of the action, in the first instance by the Lord Ordinary (Fraser), and thereafter, by the unanimous judgment of the Second Division.

The Inner House Judges, and the Lord Ordinary, were all of opinion that the condonation which the law infers from the resumption of conjugal intercourse by a husband or wife who is in the full knowledge of the other spouse's guilt, is absolute and unconditional, and that the acts of adultery condoned can never thereafter be made the grounds of an action of divorce. The Lord Ordinary was of opinion that the spouses may set aside the inference which the law derives from cohabitation, renewed in these circumstances, by stipulating that the condoning spouse shall have the right to have a divorce for the adultery condoned in the event of the offending spouse committing some act reasonably entitling him or her to that remedy, although that act should of itself afford no ground of divorce. His Lordship held that the condition alleged by the appellant was lawful, and was established by the proof; and he would have granted decree of divorce had he been of opinion that the subsequent communications between the respondent and Mr. Eayres were attributable to malus animus, such as a desire to renew their illicit intercourse. His Lordship, however, came to the conclusion, upon the evidence led before him, that the sole object of the respondent was to get back from Mr. Eayres her letters, and a ring which she had given him, in order to prevent these being made the occasion of future trouble or scandal; and he accordingly held that the condition had not been, in substance, violated. The learned judges of the Second Division were unanimously of opinion that condonation of adultery (cohabitation following) cannot be made conditional by the parties; and they accordingly held that the character of the respondent's communications with Mr. Eayres in 1882 was immaterial unless these were such as to imply that the crime of adultery had been committed.

On behalf of the appellant these four propositions were maintained; (1) That by the law of Scotland, condonation is always subject to the implied condition that the right to found upon the condoned adultery revives whenever the offending spouse subsequently commits a similar offence, or acts of impropriety, although these do not amount to adultery; (2) That assuming no such condition to be implied at common law, it may be lawfully adjected, by mutual consent of the spouses, to remission of adultery, though followed by the renewal of conjugal intercourse; (3) That the appellant did attach the condition which he alleges to his forgiveness of the respondent's acts of adultery with Mr. Eayres prior to July, 1881; and (4), That the respondent in January, 1882, without going the length of actual adultery, did violate, not only the letter, but the spirit and substance of the condition.

The third and fourth of these propositions relate to matters of fact, which need not be considered, unless both or one or other of the antecedent propositions, which involve purely legal questions, be affirmed. Being of opinion that the legal propositions maintained by the appellant are not in accordance with the law of Scotland, I have not found it to be necessary to deal with these matters of fact.

I concur in the Lord Ordinary's observation that "the doctrine of condonation of adultery is derived in Scotland from the canon law;" and also in the statement made by Lord Young, "that no Scotch lawyer has ever regarded condonation for adultery as other than absolute by our law, exactly as it is by the canon law." Scotch judges and Scotch lawyers have frequently expressed their belief that the marriage law of Scotland, both as regards the constitution and the dissolution of the nuptial tie, rests upon the basis of the canon law; and I shall endeavour to indicate the considerations which appear to me to justify that belief.

Before the Reformation all jurisdiction in matrimonial causes belonged to the Bishops' Courts, from which an appeal lay, not to the Civil Courts of Scotland, but to Rome. By a charter, dated the 8th of February, 1563 (1), Queen Mary, with the advice of the Lords of her Secret Council, in order to provide a remedy for the lapse of ecclesiastical jurisdiction, appointed four principal commissaries at Edinburgh, to have an original and privative jurisdiction in all marriage, divorce, and bastardy causes, subject to the review of the Court of Session only. In the year 1592, that appointment was ratified by the Scottish Parliament, 1592, c. 64 (2). The Act narrates that "the jurisdiction ecclesiasticall belonging to the officiallis of auld is and wes divolvit in the commissaries chosin and nominat be our soverane Lord's dearest mother," and then proceeds to ratify and approve the institution of the commissaries, and the jurisdiction devolved upon them, and finally declares "the said jurisdictioun to be als ample of the same force and authoritie with the jurisdictioun of the saidis officialiis to quhome thai succeedit."

Considerable changes were made upon the matrimonial law previously administered in the Ecclesiastical Courts by the legislation of the Reformation period. Under the canon law, from the Council of Trent until the Reformation, the marriage tie was universally regarded as indissoluble, and separatio thori was the only remedy given for adultery in the Courts of the Church. The Act 1573, c. 55, established in Scotland the remedy of divorce à vinculo for desertion. Divorce à vinculo for adultery, which Lord Stair traces to the direct authority of Scripture (3), seems to have been previously adopted by the New Consistorial Courts, in compliance with legislation for the establishment of the

(1) Printed in Balfour's Practicks, 670.

(2) 3 Thomson's Acts, 574.

(3) Stair, Inst. 1, 4, 7.

reformed religion, such as is to be found in the well-known statutes of 1560 and 1567 (1). By these Acts the Scottish Parliament not only abolished the jurisdiction of the Pope and his bishops, but affirmed in general terms the authority of the Scriptures, and, inter alia, enacted that the sovereigns by their coronation oath should make faithful promise "to reule the pepill committit to their charge according to the will and command of God, revelit in his foirsaid Word, and according to the lawis and constitutionis ressaivit in this realme, nawyse repugnant to the said Word." The new remedy of divorce for adultery very early received statutory recognition. The Act, 1563, c. 74, which makes notour (2) adultery punishable by death, also declares that its Provisions shall in no wise prejudice any party to pursue for divorcement for the crime of adultery before committed, conforme to the law.

The commissaries had no rule to guide them in the administration of matrimonial suits, except the canon law, so far as it remained unaltered by express statute, or by legislative recognition of the reformed faith. Lord Stair, who entertained little respect either for those who framed or for those who, before the Reformation, administered the canon law, says (3): "So deep hath this canon law been rooted, that, even where the Pope's authority is rejected, yet consideration must be had to these laws, not only as those by which church benefices have been erected and ordered, but likewise as containing many equitable and profitable laws, which, because of their weighty matter and their being once received, may more fitly be retained than rejected." Bankton states (4) that the canon law has no authority in matters of faith; "but is much respected with us, in what relates to ecclesiastical rights established upon the Reformation, and in consistorial cases it still predomines." In saying that the commissaries looked for guidance to the canon law, I of course refer not merely to the corpus juris canonici, but also to the writings of eminent jurists in those countries where, after the Reformation, it had become lawful to grant divorce à vinculo for adultery.

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(1) 2 Thomson's Acts, pp. 526 et seq.; and 3 Thomson's Acts, pp. 14 et seq.

(2) "Notour," open or manifest adultery, punished by a criminal trial: see Forbes Inst. (1722), vol. ii. p. 122.

(3) Stair, Inst. 1, 1, 14. See also Lanc. Inst. Jur. can. 2, 16, 11 et seq.

(4) Bankton, 1, 1, 42.

The appellant's counsel hardly ventured to dispute that, according to the canonists, the effect of condoning adultery was to extinguish the offence condoned, so that it could not be brought into judgment against the offender at any future time. The texts cited by the Lord Ordinary, in the opinion which accompanies his interlocutor of the 27th of June, 1882 (1), from jurists who have always been esteemed in Scotland of the highest authority as interpreters of the canon law, fully establish that point. According to these learned writers, acts of adultery condoned expressly, or impliedly, by resumption of conjugal intercourse, in the full knowledge of the spouse's guilt, cannot thereafter be set up as constituting a substantive matrimonial offence, entitling the spouse who forgave them to the remedy of divorce. At the same time these condoned acts, though incapable of being made the grounds of divorce, might be proved, in so far as they tended to throw light upon charges of adultery posterior to the condonation.

I do not doubt that it was within the power of the commissaries, or of the Court of Session on appeal from them, to reject or modify any rule or doctrine of the canon law which appeared not to be in itself reasonable or expedient, although it might be neither contrary to express enactment, nor inconsistent with any rule of Scripture, as interpreted by those who held the reformed faith. And, if there were no authority to shew that the plea of condonation has received the same effect in the law of Scotland as it was understood by Voet and Sanchez to have in the canon law, I as little doubt that your Lordships would now have to determine, on general principles, whether their interpretation of the law ought to be followed, or whether the doctrine of condonation, in the law of Scotland, ought to be understood in the sense contended for by the appellant. In the absence of any evidence or authority to the contrary, I should still be of opinion that there was a strong à priori probability that the doctrine received and acted on by the Consistorial Courts of Scotland was actually in accordance with the canon law as expounded by the

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(1) *Ante*, p. 217.

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jurists to whom I have referred. In Scotch books of law the authorities as to the legal effect of condoning adultery are not numerous, possibly because judges and counsel had the same understanding of the law; but such authority as is to be found there is either consistent with, or expressly confirms, the view taken by the learned judges of the Court below. I have been unable to find, in the text-writers and decisions, a single sentence which favours the contention of the appellant.

The only passage in Lord Stair's Institutions bearing upon this point (1) is as follows: "Adultery and desertion do not annul the marriage, but are just occasions upon which the persons injured may annul it, and be free: otherwise, if they please to continue, the marriage remains valid."

Bankton (2) thus states the law: "It is likewise a most relevant defence against an action of divorce for adultery, that the pursuer admitted the defender into conjugal society and embraces, after he or she knew of the criminal fact; it imports a full reconciliation, in the same manner as if the injured party had expressly forgiven the defender, or remitted the injury."

Mr. Erskine treats of condonation in terms somewhat similar. He explains (3) that adultery as well as wilful desertion are merely occasions or handles which may be laid hold of in order to obtain divorce: "But if the injured party choose to live on in a married state, the marriage continues in full force." Again, in treating of collusion (4), the same writer says: "Cohabitation by the injured party, after being in knowledge of acts of adultery committed by the other spouse, if it has not been constrained by force or menaces, imports a passing from or forgiveness of the prior injury, and is therefore sufficient to elide any action of divorce that may afterwards be pursued upon those injurious acts."

I shall only observe that the language of these learned authors is singularly ill chosen if they intended to express the idea that condoned acts of adultery merely lie dormant, until they again become grounds of divorce à vinculo by reason of the guilty spouse committing some further act, whether amounting to or falling short of adultery. If that be the true legal result of

(1) Stair, Inst. 1, 4, 7.
(2) Bankton, 1, 5, 128.
(3) Ersk. Inst. 1, 6, 43.
(4) Ibid. 1, 6, 45.

condonation, it is surely inaccurate to say, with Lord Stair, that the marriage "remains valid," or, with Erskine, that it "continues in full force." In that case, the marriage would not continue in full force, after condonation, because it would thenceforth be liable to dissolution, in the event of certain acts being done by one of the spouses, which could not previously have been made the occasion of divorce.

There is a treatise on the Consistorial Law of Scotland, by James Fergusson, Advocate, who held the office of commissary in the beginning of this century, which I may here refer to as shewing what one of the judges of the Consistorial Court then understood to be the law which he had to administer. The author says (1): "Reconciliation after knowledge of infidelity has been sustained as a bar against founding on any previous act of infidelity on the action of divorce for adultery. But, on the contrary, as to maltreatment, from its continuous and cumulative nature, the rule is opposite, and it is justly held, that as the suffering party ought not to break up the conjugal society while there is hope of amendment, the merit of forbearance, until injuries shall become intolerable, will not then weaken, but, on the contrary, will strengthen the claim to redress by separation, à mensa et thoro, and for separate alimony, supported by proof of the whole course of maltreatment."

I now pass from the text-writers to the consideration of those judicial decisions which appear to me to have a material bearing upon the main question before the House. First of all there is a report by Lord Monboddo (2) of an anonymous case decided by the Court of Session on appeal from the commissaries in the year 1710. A wife having instituted an action of divorce on account of adultery, the husband pleaded in defence that after the adultery was committed the pursuer cohabited with him, and had a child by him. It was answered for the pursuer, (1st) that she had no certainty of the adultery having been committed, though she had reasonable grounds of suspicion; (2nd) that her not separating from the defender was no proof of her having forgiven him; and (3rd) "supposing this to be an evidence of her being disposed to forgive, yet there was a fresh provocation alleged, viz., an attempt to poison her, which made it lawful for her revocare ad animum the first injury." The learned reporter adds, "but these answers the Lords did not sustain." An attempt upon the life of a spouse is a very serious matrimonial offence, for which, if proved, the law of Scotland has an appropriate remedy, yet the Court held that it could not have the effect of restoring the wife's right to have a divorce for adultery which she had previously condoned.

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(1) Fergusson, 1829 ed. p. 195; see also p. 178.

(2) Jan. 26, 1758. Brown's Suppl. vol. v. p. 863.

Then follows the case of *Leslie* v. *Nairn* decided by the commissaries in 1712, of which a brief report, taken from the record, is to be found at page 164 of Lothian's Practice and Styles of Consistorial Actions. In that case, a defender, charged with a series of adulterous acts, produced an express discharge by his wife in writing of all faults committed by him prior to the 15th of May, 1710. The lady objected that the remission was conditional, in case the defender should behave dutifully in time coming, which he had not done; but the commissaries sustained the process "only upon facts and qualifications committed since the 15th of May, the date of the discharge and reconciliation."

The next case in point is *Lockhart* v. *Henderson* (1). Jean Lockhart brought an action of divorce for adultery against her husband John Henderson, who pleaded recrimination in defence, and also raised a counter action of divorce. The reporter falls into a curious but obvious error in stating that the husband's defence and counter action were "founded entirely on alleged acts of guilt known to him before a reconciliation between the parties in November, 1793." It plainly appears from the proceedings as reported, and also from the session papers, that the husband charged his wife, in general terms, with a series of adulterous acts both before and after November, 1793, but the only acts specially condescended on were prior to that date. In the action at the wife's instance, the commissaries on the 15th of September, 1797, "sustained the defence founded on alleged acts of adultery committed by Jean Lockhart, the pursuer, whether prior or posterior to November, 1793, as sufficient, if proven, to elide the libel," and allowed a proof. The interlocutor pronounced, of the same date, in the counter action by the husband, was in these terms: "Find it proven by the letter in process, dated November, 1793, and by the pursuer's own admission, that he was reconciled to the defender and cohabited with her so late as the said date of November, 1793; and, in respect of such reconciliation and cohabitation, dismiss the libel, so far as founded upon acts of adultery which came to his knowledge prior to November, 1793; and, before farther answer, ordain the pursuer to give in a pointed and articulate condescendence of such acts of adultery committed by the defender posterior to November, 1793, as he still avers and is willing to prove." By these two judgments the commissaries in effect decided that, whilst the husband was entitled to found upon the acts of adultery which he had condoned, as raising a personal bar against his wife's demand for a divorce, he could not be allowed to state or prove them as grounds of divorce, notwithstanding his allegations that she had persevered in her adulterous conduct after condonation.

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(1) Dec. 7, 1799. Mor. Dict., voce Adultery, Appendix 1.

As John Henderson did not move in either of these causes, his wife, in the action at her instance, obtained circumduction against him; a judicial declaration that he had, by his default, forfeited his right to lead the proof allowed him, and she then led a proof in absence, upon consideration of which the commissaries granted her decree of divorce. The husband carried the case to the Court of Session, by bill of advocation, craving to be reponed against the decree, and the Lord Ordinary remitted to the commissaries to allow him a proof in defence, in terms of their interlocutor of the 15th of September, 1797. His wife thereupon appealed to the Court of Session against that interlocutor, and maintained, in the first place, that recrimination was no bar to a divorce, and, in the second place, that the proof ought, at all events, to be restricted to acts of adultery alleged to have been committed by her after November, 1793. The interlocutor of the 15th of September, 1797, in the counter action at the husband's instance, was not brought under review; but both spouses in their pleadings before the Court of Session in the suit at the wife's instance, conceded that it was well founded.

The husband, to whom it was adverse, admitted that the reconciliation had been rightly sustained in bar of prior adultery as a ground of divorce at his instance, but maintained that it had been properly refused effect in his wife's action, seeing that condonation did not remove the personal objection to an action raised by a party not herself innocent. "The Court," says the reporter, "were clearly of opinion that recrimination is no bar to divorce, though mutual guilt may affect patrimonial consesequences; that on this account it can be stated only in a counter action; and that reconciliation is a complete objection on both sides to a proof of prior guilt then known to the parties." Their Lordships according remitted to the commissaries to repel the defence of recrimination as a bar to divorce, and to proceed as they should see just.

The next case is that of *Duncan* v. *Maitland* (1), the circumstances of which were somewhat peculiar. The parties were married in 1782 at Dundee, where they continued to reside, but the husband, in the course of his business, was often absent for long periods in England. On one of these occasions, in 1795, when he was about to return to Dundee, he received information to the effect that his wife had committed adultery with a person of the name of Moncrieff. On his return home, he made some inquiries about the matter, but resumed cohabitation with his wife, and lived with her for nine consecutive months. After that the husband went to reside at Huddersfield, his wife remaining in Dundee; and in July, 1806 he raised an action of divorce, founded on the alleged acts of adultery with Moncrieff in 1793 and 1794, coupled with the allegation that she had ever since lived in one continued course of adultery, having for her paramours successively certain persons named, other than Moncrieff. The wife pleaded that the proof of adultery ought to be limited to the period subsequent to her cohabitation with the pursuer, in 1795; but the commissaries allowed a proof at large, and thereafter granted decree of divorce, holding that her adultery with Moncrieff was proved, and that her plea of condonation had not been established. The case was carried by appeal before the Lord Ordinary, by whom it was reported to the Second Division of the Court, then consisting of seven judges. Their Lordships were of opinion that the husband's admitted knowledge respecting the defender's guilt in 1795, his subsequent cohabitation, and the fact that there was no adequate reason given for his failing to institute proceedings for thirteen years afterwards, were together sufficient to sustain her plea of condonation, and accordingly they remitted to the commissaries "to alter their interlocutor, and to assoilzie the defender." The effect of that judgment would have been to acquit the defender not only of adultery with Moncrieff, which the commissaries had held to be proved, and which was sufficient (apart from condonation) to sustain a decree of divorce, but also of the subsequent acts of adultery libelled. Accordingly, their Lordships, in a reclaiming petition at the husband's instance, qualified their previous judgment by "reserving to him his right to be heard before the commissaries as to any acts of adultery committed by the defender after his reconciliation with her."

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(1) 9 March, 1809. Fac. Col. vol. xv. p. 246.

It is unnecessary, for the purposes of the present case, to consider whether in *Duncan* v. *Maitland* (1) it was rightly held that the husband had condoned his wife's guilt prior to 1795. The Courts of Scotland, in determining whether there has been remissio injuriæ, have always attached great weight to unexplained delay on the part of the injured spouse. In the case of *A. B. and C. D.* (2) the Court appears to me to have attached even greater significance than in *Duncan* v. *Maitland* (1), to *mora,* as a circumstance implying remission. The bearing which *Duncan* v. *Maitland* (1) has upon the present case consists in this, that the Court by their judgment distinctly affirmed the doctrine, that condonation is an absolute bar to an action of divorce founded upon the injuries condoned, and that allegation or proof of subsequent adulterous conduct does not give the injured spouse any right to revert to the acts of adultery which he has remitted.

In evidence of the fact that the doctrine applied in *Duncan* v. *Maitland* (1) has been understood by the Bench to be in strict accordance with the law and practice of the Scotch Consistorial Courts, I may refer to the dicta of Lord Fullerton in *Macfarlane*

(1) 9 March, 1809. Fac. Col. vol. xv. p. 246.

(2) 20 July, 1853. 15 Court Sess. Cas. 2nd Series, 976.

v. *Macfarlane* (1), in which an unsuccessful attempt was made by the defender, in an action for separation, to exclude evidence of certain acts of cruelty which, it was alleged, the pursuer had forgiven. His Lordship, with whom Lord Jeffrey concurred, said, "In short, this reconciliation seems to be treated as an act of condonation, like the renewal of intercourse, after knowledge of adultery, in a case of divorce. There is no analogy between the two cases. An act of condonation is understood in law to efface, as grounds of action, all the previous breaches of the marriage vow; and the party who afterwards complains must found that complaint exclusively on acts subsequent to the condonation. But in an action like the present, a return to domestic society, has no such effect. It is in its nature conditional, and dependent on the permanent forbearance from those acts of violence, by the party who had formerly been guilty of them." The Lord President (Lord Boyle) and Lord Mackenzie expressed themselves to the same effect. These dicta, although obiter in this sense, that the case was not one of divorce à vinculo, were nevertheless very relevant to the point which the Court had to decide, seeing that the contention of the defender was in substance that forgiveness of cruelty ought to receive the same effect in a separation suit as condonation of adultery in an action for dissolving marriage. There are many similar expressions of judicial opinion by judges of eminence, including the present head of the Court of Session (vide *Watson* v. *Watson* (2)). But upon this part of the case it seems to me to be unnecessary to add to the unanimous and clear statements of the learned judges who decided it. These are at least sufficient to shew what has been rightly or wrongly understood by the Scottish Bench to be the retrospective effect of the plea of condonation in bar of an action of divorce for adultery.

I think it right to notice that in *Fairlie* v. *Fairlie* (3) there occur certain observations by Lord Eldon which seem to have an indirect bearing upon the question now before the House. The husband in that case, which was an action of divorce, libelled on various alleged acts of adultery by his wife in the years 1806,

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(1) 7 Feb. 1849. 11 Court Sess. Cas. 2nd Series, 533, at p. 541.

(2) 12 Scot. L. R. 78.

(3) July 3, 1815. 6 Paton, App. Cas. 121, at p. 129.

1807, and 1808. The commissaries after a preliminary proof had been led by the defender with a view to establish condonation, decided against her, and allowed the pursuer a proof of the whole facts alleged in the libel; but the Court of Session altered their judgment and sustained the wife's plea in bar. An appeal having been taken in this House, the cause was remitted for further consideration. The Lord Chancellor (Lord Eldon), after pointing out the extreme nicety and difficulty of coming to the conclusion upon such evidence as had been adduced, that the husband must have known, or did believe in his wife's guilt on all the occasions libelled, went on to say: "I am quite satisfied that this case has not been sufficiently considered upon these nice points, and there is one particularly which may require a little further consideration; and that is this: *supposing that it happens that a man has forgiven his wife the act of adultery committed at one time, it cannot be contended that that is to operate to all time thereafter that she pleases;* and therefore the case is to be considered, not with reference to the conduct of the husband, as to one act of adultery alleged to have been committed in 1806, but the case, when put on the question of remissio injuriæ, must be considered with reference to the years 1806, 1807, and 1808. *If he did remit the injury committed in* 1806, *no man will argue that he thereby gave her a license, as it were, to commit as many acts of adultery as she thought proper in the years* 1807 *and* 1808; and, therefore, when, in a case of this sort, judges jump to the conclusion that the husband has remitted, and do not at all establish that he was acquainted with the facts, and meant to forgive that which he knew had taken place, as contradistinguished from his being induced to believe that the fact of adultery had not taken place; and *when, again, the point to which I have last adverted, is considered, that the remissio injuriæ cannot extend to a further period,* I think it is fit the case should be further considered."

Lord Eldon was of opinion that the Court below had somewhat hastily inferred, from the evidence, that the husband had condoned all the acts of adultery libelled; and for their information and guidance, he indicates two other possible inferences,—the one that the conviction of his wife's guilt had never forced itself upon the mind of the husband, and the other that he knew or believed that she was guilty in the year 1806, without having knowledge or belief of her adultery in the two succeeding years. In the latter case the noble Lord points out (what does not seem to admit of dispute) that the remission of adulterous acts committed in 1806 could not have the effect of condoning similar offences committed in 1807 and 1808; and he does so in terms which appear to me to imply that such remissio injuriæ, though it could not extend to a further period, would yet bar the appellant from founding on acts which he had knowingly forgiven. At all events the language of the noble Lord does not suggest that condonation of acts of adultery in 1806 would cease to be operative, in regard to these offences, if the husband should prove that in 1807 or 1808 his wife had committed adultery, or had conducted herself in an unseemly manner, without committing adultery.

I have dwelt, perhaps with unnecessary detail, upon the Scotch authorities, because they were ignored by the learned counsel for the appellant, who rested his case upon English decisions, and some of them were not referred to by the respondent's counsel. To my mind these authorities, which have not been trenched upon by any judgment of this House, do sufficiently establish that the effect attributed by the law of Scotland, for nearly two centuries past to full condonation, by which I mean remission with the knowledge of the acts forgiven, followed by cohabitation as man and wife, is that it affords an absolute bar to any action of divorce founded on the condoned acts of adultery.

The appellant, however, maintains that although at common law, there should be no implied condition making condonation revocable, in the event of the offending spouse being thereafter guilty of adulterous conduct or of impropriety other than actual adultery, the parties themselves may, nevertheless, adject a condition of that kind. To render such a condition valid, it was argued that it is only necessary to satisfy the Court that it was, in the circumstances in which the parties were placed, a reasonable condition, even though the acts, in respect of which the condoned adultery was to revive, should not per se constitute a matrimonial offence of which the law takes cognisance in an ordinary divorce suit. To the appellant's argument upon this point I cannot assent. To give effect to it would, I venture to think, not only be to introduce a new element of uncertainty into the Scotch law of marriage, but to recognise a principle utterly inconsistent with that law.

If a husband, on coming to the knowledge that his wife had been guilty of adultery, were to say to her, "I shall not, in the meantime, cohabit with you, but I forgive you the past, upon the express condition that you never see or write to your paramour again," I do not, as at present advised, see any reason to suppose that, if the wife violated that condition, the husband would be precluded from having a divorce on the ground of her previous adultery. So long as the spouses continued to live apart, a remission in these qualified terms, would not in my opinion, constitute plena condonatio, according to the law of Scotland. But it is a very different matter, when the spouses resume cohabitation as husband and wife. In the old case of *Watson* v. *Cruikshank* (1), which is referred to by Mr. Erskine in a passage from which I have already quoted (2), the Lords found "that the wife's conversing with the husband as man and wife, after the deeds of adultery were particularly known to her, did infer the passing from divorce on these deeds;" and that doctrine has ever since been accepted as the law of Scotland. In considering this point the conclusive effect which the law of Scotland assigns to cohabitation as man and wife, not as constituting, but as evidencing ipsum matrimonium, must not be lost sight of; for to that source the rule laid down by our institutional writers, that the marriage continues "in full force" whenever cohabitation is renewed by a spouse who is in the knowledge of the other's adultery, appears to me to be traceable. If effect were given to such a condition as the appellant pleads the marriage would not continue "in full force." It would be liable to dissolution in the event of one of the spouses violating the condition by the commission of an act which the law does not recognise as a matrimonial offence, or as a ground of divorce à vinculo.

It is, in my opinion, contrary to the policy of the matrimonial

(1) 15 July, 1681. Mor. Dict. 330.

(2) Ersk. Inst. 1, 6, 43, see ante, p. 248.

law that parties should be permitted to alter or vary, by private paction, the legal rules upon which the constitution or dissolution of marriage depends. No one would venture seriously to maintain that two persons contracting marriage could effectually stipulate that it was to be dissoluble for any cause, or upon any terms other than the law prescribes. And, if I am right in holding that it is a rule of the law of Scotland that a spouse who, in the full knowledge of past acts of adultery, renews conjugal intercourse with the offender, thereby loses for ever his right to sue for divorce in respect of these acts, upon what principle can the spouses be permitted of mutual consent to set aside that rule?

I have hitherto spoken of the law applicable to this case as I understand it to be settled by authority in the Courts of Scotland, and, in the view which I have taken, I should not feel myself entitled to alter that law, even if it could be shewn that the rule which has been followed by the Courts below is not the wisest or most expedient. But I think it right to say that I am not convinced either of the unwisdom or of the inexpediency of the rule. If your Lordships were to affirm the contention of the appellant, a woman might, for a long period of years subsequent to her conditional pardon, enjoy the position and privileges of a wife, might become the mother of a numerous family, and then, all at once be stripped of her matrimonial status, because, in some moment of folly or weakness she happened to violate the condition upon which that status had been made dependent.

Having come to the conclusion (for the reasons which I have endeavoured to explain) that the judgment of the Court below is in accordance with Scotch law, I shall not take it upon me to criticise, in detail, the English decisions which were referred to and founded on for the appellant. Undoubtedly there are to be found in these cases judicial dicta which seem to favour his contention. But it does not occur to me that those dicta can be regarded as of authority in a case like the present, which are referable to a time when the remedy of divorce à vinculo could not be obtained in an English Court. And, since the unloosing of the bonds of matrimony, by judicial decree, has been sanctioned by statute, it has never, so far as I am aware, been made matter of actual decision in England that a condoned offence can be founded on in a divorce suit, except in cases where the forgiven spouse was afterwards guilty of a substantive matrimonial offence, constituting, in itself, one of the grounds of divorce à vinculo. Even supposing that the present question had never been settled in Scotland, and that in England decisions had gone the full length of these dicta, it would still have been necessary, in my opinion, to consider very carefully the material discrepancies which exist between the laws of the two countries affecting the rights of the innocent as in a question with the offending spouse, before introducing the English rule into the law of Scotland. That the differences between the two systems of law may give rise to very different considerations of policy, was forcibly illustrated by the argument of Mr. Searle, who pointed out to your Lordships certain deplorable consequences which, according to the law of England, might follow from the affirmance of the judgments under appeal, whereas it was very obvious that no such consequences could occur according to the law of Scotland.

I am accordingly of opinion that the interlocutor appealed from ought to be affirmed.

EARL OF SELBORNE, L.C. :—

As I entirely agree with the opinions which have been delivered in this case, I think it unnecessary to add anything beyond this; that I do not understand any English decision to have determined that in England married parties can make their condonation of a matrimonial offence revocable in the event of the non-performance of a condition conventionally agreed upon between themselves, which is not in law a sufficient reason for a decree of divorce or of dissolution of marriage.

Interlocutor appealed from affirmed; and appeal dismissed, with costs to be paid as between agent and client.

Lords' Journals, 18th February, 1884.

Solicitors for appellant: *Newman, Stretton, & Hilliard.*

Agents for respondent: *Grahames, Currey & Spens, for J. & J. Ross, W.S.*

[HOUSE OF LORDS.]

H. L. (E.)
1884
March 10.

THE MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY . . . . APPELLANTS;

AND

RICHARD HORATIO COUCH KENT . . RESPONDENT.

Building Societies Act 1874 (37 & 38 *Vict. c.* 42) *s.* 16 *sub-s.* 9, *s.* 34—*Jurisdiction of High Court over Dispute between Society and Member—Arbitration.*

When the rules of a benefit building society governed by 37 & 38 Vict. c. 42 provide for the settlement by arbitration of disputes between the society and any of its members, the High Court has no jurisdiction to entertain an action by the society against a member for moneys due to it under covenants in mortgage deeds executed by the member, as such, to the society:—

So *held* by LORDS BLACKBURN and WATSON, the EARL OF SELBORNE L.C. dissenting.

Wright v. *Monarch Investment Building Society* (5 Ch. D. 726) and *Hack* v. *London Provident Building Society* (23 Ch. D. 103) approved.

APPEAL from an order of the Court of Appeal.

The action was brought in the Queen's Bench Division by the appellants against the respondent in July 1882, and the statement of claim contained the following allegations:—

The plaintiffs are a building society duly incorporated and registered pursuant to the Building Societies Act 1874 (37 & 38 Vict. c. 42), and the defendant is a member of the society. By mortgage deeds made in 1878 and 1879 the defendant mortgaged to the plaintiffs certain leasehold premises to secure advances made by them to him in respect of his shares in the society, and covenanted to repay by monthly instalments the advances and premiums in respect thereof and all fines which under the rules of the society would become due in respect of the repayments; in case of default the plaintiffs to be at liberty to enter, receive the rents and uphold, repair, pay ground rents and insurance premiums, &c., with a covenant by the defendant to repay all sums so expended. The claim alleged default in payment of certain instalments due on and since the 1st of May 1881, and claimed £146 13*s.* 4*d.* in respect of instalments, fines, and moneys paid for repairs, ground rents and insurances.

The statement of defence denied the making of the deeds and traversed all the material allegations in the claim with respect to the effect of the deeds, the alleged defaults, the payments made by the plaintiffs, and the liability on the part of the defendant; and alleged that the defendant had before the 1st of May 1881 given notice and offered to pay off all moneys due to the plaintiffs, but that they refused to receive repayment or to execute reconveyances and claimed to retain the securities in respect of certain other alleged claims unconnected with the said advances. The defendant also counter-claimed for damages in respect of such refusal and of certain alleged negligence of the plaintiffs as mortgagees in possession.

The reply traversed all the material allegations in the defence and counter-claim.

Notice of trial in Middlesex having been given and the cause having been set down for hearing, a summons was taken out at chambers by the defendant to stay the action on the ground that the Court had no jurisdiction. The matter having been referred to the Court, the Queen's Bench Division (Manisty and Stephen JJ.) ordered a stay, and upon appeal this order was affirmed (without argument) by the Court of Appeal (Brett M.R. Cotton and Bowen L.JJ.) upon the authority of *Hack* v. *London Provident Building Society* (1).

The 49th rule of the society provided that in case of dispute arising between the society and any members thereof, or the legal representatives of any members, it should be settled by arbitration. The other rules are sufficiently set out or referred to in the judgment of the Lord Chancellor.

1883. Nov. 29, 30. *Davey* Q.C. and *Thomas Terrell* (*Henry Terrell* with them) for the appellants:—

The question is whether, as the appellants contend, the decision in *Mulkern* v. *Lord* (2) applies to the Building Societies Act of 1874 (37 & 38 Vict. c. 42). The same principle governs both cases. The Legislature creates a domestic tribunal and refers to it domestic disputes only, questions arising between the society and its members as such. The Court of Appeal simply followed

(1) 23 Ch. D. 103.

(2) 4 App. Cas. 182.

Hack v. *London Provident Building Society* (1), from which this is in substance an appeal. In that case the Court took an erroneous view of sect. 16 sub-sect. 9 and sects. 34–36 of the Act of 1874. Those clauses apply, not to disputes between the society and its members arising out of a mortgage deed, but only to disputes between the society and its members as such, under the rules. The consequences of a decision contrà are very startling. A foreclosure decree operates as a conveyance of the equitable estate *Pugh* v. *Heath* (2). The Legislature will not be held without express words to have authorized an arbitrator to exercise such a power. The registrar may be quite unfit to decide questions of such difficulty and importance as constantly arise in such actions. These were the considerations upon which the cases under the earlier Acts were decided; e.g. *Fleming* v. *Self* (3), per Lord Cranworth; *Morrison* v. *Glover* (4); *Farmer* v. *Giles* (5); *Reg.* v. *Trafford* (6). There is no material difference between the language of 10 Geo. 4 c. 56, and the present Act; nothing to shew that the jurisdiction of the arbitrator is to be enlarged. The arbitrator may no doubt state a question of law for the opinion of the High Court (sect. 36), but also he may not, and if he does not the most complicated and important questions of universal application may be determined without appeal or review. The decision in *Wright* v. *Monarch Investment Building Society* (7) must be taken to be overruled by *Mulkern* v. *Lord* (8).

Sir *F. Herschell* S.G. and *W. Willis* Q.C. (*H. Tindal Atkinson* and *E. Bennett Calvert* with them) for the respondent:—

In *Mulkern* v. *Lord* (8) this House must have considered that *Wright* v. *Monarch Investment Building Society* (7) differed in its facts, for the Lords do not refer to it, though their attention was pointedly called to it. The observations of Lord Campbell in *Reeves* v. *White* (9) are pertinent. Probably in order to enforce foreclosure the society might go to the High Court. Sect. 35 of the Act of 1874 treats the jurisdiction of the High Court as ousted by sect. 34, and makes certain exceptions. Sect. 36 enables the arbitrators, or the registrar, or the County Court (sect. 4) to state a case for the opinion of the Supreme Court on any question of law, and there is no reason to suppose that such a power will not be exercised where desirable. The obligations entered into by the respondent are strictly obligations as a member, and they are described as the obligations of a subscriber for so many shares. Any questions arising on the mortgage deed or with respect to nonpayment of instalments are "disputes" between the society and one of its members as such. If the society can come into the High Court and sue it would be destructive of the whole object of the Act, which contemplated the advancement of money to members and the making of mortgages, &c. *Fleming* v. *Self* (1) and *Farmer* v. *Giles* (2) proceeded on the ground that under the earlier Act there was no sufficient machinery in arbitration adapted to reach such cases as those. The Act of 1874 remedies that defect. The decision in *Morrison* v. *Glover* (3) turned on the arbitration clause there in question, and on the fact that there was a covenant to pay rent to a stranger, and that the dispute involved a collateral matter not affecting the other members of the society: per Pollock C.B. (4).

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(1) 23 Ch. D. 103.

(2) 7 App. Cas. 235.

(3) 3 D. M. & G. 997, 1030.

(4) 4 Exch. 430.

(5) 5 H. & N. 753.

(6) 4 E. & B. 122.

(7) 5 Ch. D. 726.

(8) 4 App. Cas. 182.

(9) 17 Q. B. 995, 1015.

Davey Q.C. in reply:—

The Act no doubt intended to oust the jurisdiction of the High Court in certain cases: *Crisp* v. *Bunbury* (5); but no further than the language used warrants, nor where the machinery provided is inadequate. The only increased powers given by the Act of 1874 to the arbitrators are a discretion to state a case for the opinion of a Court of law.

The House took time for consideration.

1884. March 10. EARL OF SELBORNE, L.C.:—

My Lords, I have the misfortune in this case to differ from the rest of your Lordships who heard the argument; and I have doubted whether it might not be best for me to abstain from stating publicly my reasons for the opinion which I have formed, since your Lordships after considering them have not found them satisfactory. But inasmuch as the question is one of very great general importance to all these societies, whose welfare and due regulation are matters of public concern, and as it is possible that the operation of the laws relating to them may at some future time be found again to require attention from the Legislature, I think that, upon the whole, I shall best discharge my duty by stating what my judgment would be upon this question, if the power of judgment rested with me.

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(1) 3 D. M. & G. 997, 1030.

(2) 5 H. & N. 753.

(3) 4 Exch. 430.

(4) 4 Exch. at p. 443.

(5) 8 Bing. 394.

It has been determined in the Court below that a provision in the rules of a benefit building society governed by the statute 37 & 38 Vict. c. 42 for the settlement by arbitration of disputes between the society and any of its members, or their legal representatives, takes away the jurisdiction of the High Court to entertain an action by the society against one of its members for moneys due to it under covenants in mortgage deeds, executed by the defendant to the society.

The object of the society, as stated in its second rule, was to raise, by the subscriptions of its members, a stock or fund for making advances to members out of its funds, upon security of freehold, copyhold or leasehold estate by way of mortgage, with power, "so far as necessary for the said purpose," to hold land, with the right of foreclosure, and to raise funds by the issue of shares of one or more denominations, either paid up in full or to be paid by periodical or other subscriptions, and with or without accumulating interest, and to repay such funds when no longer required for the purposes of the society. A proviso was added, that "any land to which the society might become absolutely entitled by foreclosure, or by surrender, or other extinguishment of the right of redemption," should, as soon as conveniently might be, be sold.

There were to be two kinds of "ordinary shares,"—fully paid and subscription shares, both of the nominal amount of £10. The subscription shares were to be paid up by instalments of 1*s.* per month per share; and at the end of each year interest at 5 per cent. per annum was to be credited upon them, provided the

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instalments due had been regularly paid. On reaching the amount of £10 they were to become fully paid shares, with all the advantages of such shares. There was also power for the directors to issue preference shares.

Members were to be at liberty on certain terms specified in rule 5 to withdraw the amount standing to their credit in the books of the society, and also in the manner specified in rule 6 to transfer their shares.

The 7th rule authorized the society to receive deposits or loans from its members or other persons, subject to a limit of the amount to be at any time due in respect of such deposits or loans to "two-thirds of the amount for the time being secured to the society by mortgages from its members."

The 22nd rule regulated the law costs payable by borrowers on the security of freehold or leasehold property, when all business might be transacted in town. The 23rd provided for the survey of properties offered to the society, and for the fees in respect of such surveys, to be paid by the applicants for advances.

Rule 29 provided for certain fines and forfeitures on advanced shares; and Rules 32 to 34 inclusive related to the terms on which advances might be made.

Rule 35 provided that any member receiving an advance should execute a mortgage to the society to secure his future payments, "which mortgage should contain all such covenants and provisions as the solicitor might advise;" and that on the satisfaction of all claims of the society upon any property mortgaged, a receipt in a specified form should be indorsed upon the mortgage at the expense of the mortgagor.

The effect of the eight following rules (36 to 43 inclusive) is, that a member who had obtained an advance might if he pleased sell the mortgaged property, and the purchaser might take it subject to the mortgage, and thereupon should become liable for the payment of all advance repayments in arrear, and all fines then due thereon, as well as for all future advance repayments and fines thereon from time to time falling due in respect of such mortgaged property. If the sanction of the board were given to the transfer, the vendor was to become entitled to a release from the

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society. For every payment in arrear the borrower in default was to be chargeable with a fine of one penny per share per month, and if the arrear should continue for three consecutive months, the directors might enter into possession and sell the mortgaged property, or collect the rents, and reimburse the society, and after paying all expenses hand over the balance, if any, to the defaulting member. If incomplete works on any mortgaged premises should not be proceeded with in a manner satisfactory to the society, the directors might complete them, adding the cost to the amount due on the mortgage. All such property was to be insured by the society, and the member, on whose account the premiums should be paid, was on demand to refund the amount, or it might be deducted from any of his payments; and provision was made for the application of the insurance moneys which the society might receive in case of fire. The 43rd rule is in these words:—"Any member desirous of redeeming the securities held by the society shall be at liberty to do so upon payment of all sums then due from him for subscriptions, fines, and interest, and also the present value of the future repayments, as ascertained by reference to the tables. All expenses incurred upon every sale, exchange, or redemption of any property shall be borne and paid by the member." The 47th rule empowered the society, on the sale of property mortgaged to them by a member, if such member were dead intestate leaving an infant heir, to pay any surplus proceeds of the sale, not exceeding £150, to the legal personal representative of the deceased member, as part of his personal estate. There were tables shewing the rates of repayment for various terms of years, with power for the society to vary them; and there were rules of the kind common in such societies, providing for the appointment, duties, and removal of directors and other officers, for the meetings of members, and generally for the management of the affairs of the society.

The 49th rule, as to arbitration, is as follows:—"In case of dispute arising between the society and any members thereof, or the legal representatives of any members, it shall be settled by arbitration. Arbitrators shall be elected by the board, none of them (directly or indirectly) beneficially interested in the society, and, in case of reference to arbitration, the names of all the arbitrators shall be written on separate pieces of paper, and placed in a box; and the three whose names are first drawn by the complaining party, or some one delegated by him or her, shall be the arbitrators to decide the matter in dispute; and their decision shall be final."

On a review, it will be seen (1st) that although raising a fund for making advances to members was the purpose for which the society was established, it was not to consist of advanced members only; (2nd) that many matters unconnected with mortgages are regulated by the rules, as between the society and its members (advanced or unadvanced), out of which disputes might from time to time arise; (3rd) that many matters connected with mortgages from advanced members, which are also so regulated, are in the nature of conditions of advances, as between advanced members and the society, and independent of the legal and equitable relations of mortgagor and mortgagee, as constituted by deed; and, (4th) that the securities contemplated by the rules are mortgages in the proper and legal sense of that term, i.e. mortgages by deeds, to be executed on each particular occasion, containing such covenants and other provisions as the solicitors of the society should think adapted to the circumstances of each case, the terms of which the rules do not in any case prescribe; mortgages, subject to the usual equitable rights of foreclosure by the mortgagees and redemption by the mortgagors; and the equity of redemption of which the mortgagors might, without any consent, transfer to purchasers not members of the society. That the word "foreclosure" is used in the second rule in its legal and proper sense seems evident, from the fact that it is there distinguished from "surrender, or other extinguishment of the right of redemption."

If I had to construe the arbitration clause in these rules, without reference to any statute or other authority, it would certainly appear to me to relate to disputes under the rules, between members (in that character) or their representatives, in respect of their rights or liabilities as such, and the society; and not to questions arising out of covenants or special stipulations in deeds executed between members and the society, and embodying contracts collateral and additional to the social contract, though of a nature contemplated and authorized by it; nor to any questions between the society as mortgagee, and one of its members as mortgagor, with reference to the legal consequences of, or rights and liabilities resulting from, the relation of mortgagor and mortgagee.

All the authorities decided under the statute which regulated societies of this kind before 1874 are in accordance with that view. *Morrison* v. *Glover* (1) was so decided on the broad ground that a question arising out of breaches of contract in a mortgage deed executed to a building society by one of its members was a dispute, "not between the society and the defendant as a member of the society, but between them as mortgagor and mortgagee." "If" (said the Lord Chief Baron) "any other rule be established than this, that matters in difference between the society and its members, in the character of members, can alone be referred to arbitration; if we go one step beyond that, then extraneous matters of any kind which may happen to be in dispute between the society and any of its members, ought to be the subject of a reference. It appears to us, therefore, that the words 'matters in dispute' must be read, matters in dispute between the society and its members as members, and not in any other capacity." The decisions in *Fleming* v. *Self* (2), *Reg.* v. *Trafford* (3), and *Farmer* v. *Giles* (4), are to the same effect, as is also the judgment of this House in *Mulkern* v. *Lord* (5). It is true that in some of those cases some of the learned Judges or Lords fortified their conclusions by pointing out the unsuitableness and inadequacy of the means of enforcing an award through an order of justices (the remedy given by that statute), except in simple questions between the society and its members as such; but I do not consider any of them to have rested exclusively on that ground. No such ground of decision was suggested in *Morrison* v. *Glover* (1) or in *Reg.* v. *Trafford* (3), nor in the opinion of Baron Bramwell in *Farmer* v. *Giles* (4). Earl Cairns and Lord Hatherley, in *Mulkern* v. *Lord* (5) relied not only on the inappropriateness of this remedy, but also upon the relative position and rights of mortgagor and mortgagee, as making it "impossible that those rights, and especially the rights of foreclosure and redemption, could be enforced or adjusted by such a reference to arbitration as is provided by 10 Geo. 4, c. 56, s. 27."

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(1) 4 Ex. 430, 444.

(2) 3 De G. M. & G. 997, 1030.

(3) 4 El. & Bl. 122, 131.

(4) 5 H. & N. 753, 762.

(5) 4 App. Cas. 182, 191.

The late Master of the Rolls had taken a different view in *Mulkern* v. *Lord* (1); and in the case of *Wright* v. *Monarch Investment Building Society* (2), followed in the Court of Appeal, under his Lordship's presidency, by *Hack* v. *London Provident Building Society* (3), he determined that none of these authorities were applicable to exactly similar questions arising in a building society governed by the Act 37 & 38 Vict. c. 52. Those decisions were held to govern the case now before the House in the Courts below; and it is from them, in effect, that the present appeal is brought.

I agree with the principle stated in *Hack* v. *London Provident Building Society* (3) by the late Master of the Rolls, that "it is the duty of the Court to find out first what the Act of Parliament under consideration means, and not to embarrass itself with previous decisions on former Acts, when considering the construction of a plain statute framed in different words from the former Acts." But I think, that the principle ought to be stated with this important qualification, that so far as a later Act, in pari materiâ, is conceived in the same, or substantially the same, terms as a former, the construction placed on those terms in the former Acts by decisions of high authority, and the principle on which those decisions have proceeded, ought not to be disregarded. Of course, if the later statute is plain, its plain meaning must prevail.

The material clause in 10 Geo. 4 c. 56 s. 27 (extended to building societies by 6 & 7 Wm. 4 c. 32 s. 4) provided that rules should be made specifying "whether a reference of every matter in dispute between the society, or any person acting under them, and any individual member thereof, or person claiming on account of any member," should be made to justices of the peace of the county, or to arbitrators appointed as therein mentioned. Whatever award was made by the arbitrators was to be binding on all the parties, and was to be final, and was not to be removed into

(1) 4 App. Cas. 182, 191.
(2) 5 Ch. D. 728.
(3) 23 Ch. D. 108.

any Court of law, or to be restrained; but might be enforced by any two justices of the peace.

The clauses in 37 & 38 Vict. c. 42, which relate to the same subject, are the 34th, 35th, and 36th sections. The 34th section provides, that "where the rules of a society under this Act direct disputes to be referred to arbitration," arbitrators shall be appointed, as therein mentioned, of whom a certain number, not less than three, shall be chosen by ballot "in each such case of dispute," in a manner to be determined by the rules. Then, after directing how the place of an arbitrator dying, or refusing, or neglecting to act is to be supplied, it proceeds: "And whatever award shall be made by the arbitrators, or the major part of them, according to the true purport and meaning of the rules of the society, shall determine the dispute; and should either of the parties to the dispute refuse or neglect to comply with or conform to such award within a time to be limited therein, the Court, upon good and sufficient proof being adduced of such award having been made, and of the refusal of the party to comply therewith, shall enforce compliance with the same upon the petition of any person concerned. Where the parties to any dispute arising in a society under this Act agree to refer the dispute to the registrar, or where the rules of the society direct disputes to be referred to the registrar, the award of the registrar shall have the same effect as that of arbitrators."

"The Court" mentioned in this and the succeeding sections is (in England) the county court of the district in which the chief office of the society is situate (1). "The registrar" is the registrar for the time being of friendly societies (2).

Sect. 35 enables "the Court" to hear and "determine a dispute" in two cases; one, when there has been a failure in obtaining an arbitration under the rules; the other, "where the rules of the society direct disputes to be referred to the Court or to justices." Sect. 36 makes "every determination by arbitrators, or by the Court, or by the registrar under this Act, of a dispute," binding and conclusive without appeal or power of removal into any Court of law, or of restraint by injunction in equity. But it enables the arbitrators, or the registrar, or the Court, at the

(1) Sect. 4.

(2) Sect. 3.

request of either party, to state a case for the opinion of the Supreme Court of Judicature on any question of law, and to grant to either party to the dispute such discovery, as to documents or otherwise, as might be granted by any Court of law or equity.

After considering these sections, and the rule of the appellant society founded upon them (which, it may be observed, is almost in the very same words with the 27th section of the Act of 10 Geo. 4), I think it is manifest, that, although the "disputes," for the settlement of which they provide, are not (as in the former Act) in so many words defined as any "matter in dispute between the society or any person acting under them, and any individual member thereof, or person claiming on account of any member;" yet the sense of the shorter form of expression, "disputes" is the same. It cannot possibly be supposed to extend to questions between the society and strangers; and the repeated reference to the rules appears to me also to shew that disputes arising under the rules must be intended.

This being so, I cannot assent to the opinion that the decisions under the earlier Act, so far as they depend upon the meaning of the words by which the subject-matter of arbitration was therein defined, are displaced or rendered inapplicable by the use of words of either larger or clearer, or in any way different signification, in the later Act.

And it also appears to me that this is really the point on which the decision of the House in the present case ought to depend; because neither the better means provided by the later Act for enforcing an award, nor the more extended powers thereby given to arbitrators, nor the introduction of the county court instead of justices as an authority which, in some cases, may itself arbitrate, can require, or by reasonable implication justify, a wider construction of the "disputes" to be referred than that word otherwise ought to receive.

It is not enough to shew that some of the arguments formerly used as to the inefficiency of the machinery provided by the earlier statutes, which approved themselves to eminent judges or to noble lords in this House, have now lost part of, or even all, their force, if the subject-matter of arbitration is still left substantially the same. It is to be added, that such rights as that of foreclosure, and others which may arise out of breaches of covenants in deeds, do not necessarily imply a "dispute" as a condition precedent to their appropriate legal or equitable remedies, unless that word should be extended considerably beyond its natural and ordinary sense.

It is undoubtedly true, that some of the arguments founded on the insufficiency of the means of enforcing awards provided by the earlier statute have now ceased to be applicable; but I cannot admit that there are no similar arguments, which still to a considerable extent apply. The machinery of an award by an arbitrator, and an application to a Court to "enforce compliance" with it, on proof of "the refusal of the party to comply therewith," may conceivably be worked out to results by which the right of a mortgagor to redeem may be barred or extinguished, or the active assertion of that right prevented; and this may perhaps be thought equivalent to foreclosure; but, if equivalent, it is as a substitute, and not the same thing. The arbitrators are under no obligation to state questions of law for the opinion of the Supreme Court, though, at the request of any party, they have power to do so; and, if they do not, their decision of such questions, however contrary to law, is to be final. The Act enables any society, by its rules, to provide that all disputes shall be referred to the Registrar of Friendly Societies; and the effect must be the same in that case as when either of the other modes of arbitration is provided. The Registrar of Friendly Societies may be a very suitable arbitrator for mere dispute arising between the society and its members under its rules; but it is to me inconceivable that the legislature can have meant all question of breaches of any of the various kinds of covenant, as to title, buildings, lights, easements, and other matters which the solicitor of the society might have required to be inserted in any mortgage deeds, whether arising with the original mortgagors or with their assignees, trustees in bankruptcy, heirs, devisees, or personal representatives, to be brought, at the option of each particular society, before this public officer, and to make him also (to the exclusion of all ordinary jurisdiction) a judge of equity in suits for foreclosure and redemption, under the obligation of taking all the accounts which may be necessary in such suits. I am not convinced that his office is at all better constituted or adapted for such a purpose than that of a justice of the peace.

It is never (as it seems to me) very safe ground, in the construction of a statute, to give weight to views of its policy, which are themselves open to doubt and controversy. It is suggested, that the policy of this statute is to withdraw all legal questions whatsoever between these societies and their members from the cognizance of the ordinary tribunals, because the members of building societies may be presumed to be, for the most part, poor persons. But they are not necessarily poor: your Lordships have had before you some instances of such societies in which the amounts advanced upon mortgage have been very large. Nor is it clear to me that remedies, divided (or capable of being divided) between three jurisdictions—arbitrators as to the whole matter, the Supreme Court as to questions of law sent to it by the arbitrators, and the County Court for the purpose of enforcing an award—may not sometimes be more costly than those afforded by a single proceeding in the High Court of Justice.

Reluctant as I always am to differ from those of your Lordships, whom I know to entertain, in this case, the opposite opinion, I think that the principles on which *Morrison* v. *Glover* (1), *Reg.* v. *Trafford* (2), and *Mulkern* v. *Lord* (3), were decided ought still to prevail, notwithstanding the difference between the two statutes, and that the order appealed from ought to be reversed.

LORD BLACKBURN:—

My Lords, this is an appeal from an order of the Court of Appeal, dismissing an appeal from the Queen's Bench Division. It was conceded before the Court of Appeal that the case of *Hack* v. *London Provident Building Society* (4) was not distinguishable from the present case. And consequently the Court of Appeal without any further argument dismissed the appeal. The appeal, therefore, to your Lordships is in substance and reality, though not in form, an appeal from the decision in *Hack* v. *London*

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(1) 4 Ex. 444.
(2) 4 El. & Bl. 131.
(3) 4 App. Cas. 182.
(4) 23 Ch. D. 103.

Provident Society (1) as well as from the decision of the Queen's Bench Division in the present case.

The late Master of the Rolls had, in *Wright* v. *Monarch Investment Building Society* (2), to deal with a building society incorporated under the Building Societies Act 1874 (37 & 38 Vict. c. 42). He held that the matters therein disputed must under that Act be referred, and that the jurisdiction of the superior Court was ousted. He says, "I cannot accede to the argument that the Act of 1874 must be construed by analogy with the decisions on the old Acts, or by the provisions of the Friendly Societies Act. The words of the Building Societies Act 1874 are in themselves sufficiently clear and I must give effect to them without reference to anything else." There was no appeal against the order he made in *Wright* v. *Monarch Investment Building Society* (2), which was made in March 1877. But in December 1877 he made an order in a case of *Mulkern* v. *Lord* (3) which was appealed against and on appeal was reversed by the Lords Justices. An appeal was brought to this House (3), when the order of the Court of Appeal was affirmed.

The society with which the Courts had to deal in *Mulkern* v. *Lord* (3) was a benefit building society, which had not obtained a certificate of incorporation under the Building Societies Act 1874, and consequently, notwithstanding the repeal of 6 & 7 Will. 4 c. 32, by sect. 7 of the Building Societies Act of 1874, the statute in force for regulating the affairs of the society was 6 & 7 Will. 4 c. 32, and not the Building Societies Act, 1874.

There is no report of what passed either before the Master of the Rolls or the Lords Justices in *Mulkern* v. *Lord* (3); but on referring to the papers in the library of this House it appears that the late Master of the Rolls commenced his judgment by saying: "The first point I have to decide (and I am told and believe it is a very important point, and there seems to be no decision upon it) is, what is the effect of the 27th section of the Act of Geo. 4, as to the appointment of arbitrators. Now this statute still regulates societies like the society I have before me;" and on that supposi-

(1) 23 Ch. D. 103.

(2) 5 Ch. D. 728.

(3) 4 App. Cas. 182.

tion, that it was a new question untouched by decisions, he put his construction on 6 & 7 Will. 4 c. 32. James L.J. very briefly says that if the cases referred to in *Mulkern* v. *Lord* (1) had been thought of, the decision would probably have been different.

In *Hack* v. *London Provident Building Society* (2), as in *Wright* v. *Monarch Investment Building Society* (3), and in the case now at bar, the society had obtained a certificate of incorporation under the Act of 1874, and consequently as regards it the 6 & 7 Will. 4 c. 32 is repealed. Pearson J. thought that both the Court of Appeal and this House, in *Mulkern* v. *Lord* (1), proceeded entirely on the former statute now repealed, and did not decide upon the construction of the Building Societies Act, 1874; and it certainly is the fact that nothing is said in the opinions delivered in this House to the effect that *Wright* v. *Monarch Investment Building Society* (3) was ill decided, though the case was cited and relied on by the appellants. If the case is overruled it can only be as a consequence of the ratio decidendi of this House. Pearson J. says "I cannot help thinking that the Act of 1874 was passed purposely to give the arbitrator larger powers than he had under the former Acts, and I should be going counter to the provisions and spirit of that Act if I were to withdraw from the society and its members the right, which it appears to me they possess, of having their disputes determined by the arbitrator, and instead thereof drive them to the expensive luxury of bringing an action in this Court."

I think there can be no question that, if by a legitimate application of the ordinary canons of construction to the Act of 1874, it appears that the intention of the legislature was what Pearson J. states, it is the duty of all courts of law to give effect to that intention. The question I think is whether it does appear.

Crisp v. *Bunbury* (4) was decided in 1832 on the construction of the Savings Banks Act 9 Geo. 4 c. 92. But the reasons of the judgment were general. Tindal C.J., after pointing out that the nature of a savings bank was an institution intended to comprehend a very large number of depositors, chiefly from the lower walks of life, many of them contributing very small sums, and that to allow actions at law would cause ruin to the institution by the expenses, proceeds to say, "It is evident therefore that the legislature contemplated the cheap, simple, speedy and equitable adjustment of all disputes by a reference in the mode pointed out in the Act, instead of a more expensive, dilatory, and uncertain remedy by an action at law; and we think we should defeat that very serviceable object—serviceable alike to the depositors and to the institution—unless we construe the words used as words which import an obligation to refer, and which take away the right to sue in the superior Courts."

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(1) 4 App. Cas. 182.
(2) 23 Ch. D. 103.
(3) 5 Ch. D. 728.
(4) 8 Bing. 394, 401.

Every word of this is applicable to a friendly society, and I do not think it is now disputed that 10 Geo. 4 c. 56 s. 27 is to be construed as importing an obligation to refer disputes between the members of friendly societies, and to take away the right to sue in the superior Courts. In *Mulkern* v. *Lord* (1) Lord Cairns without deciding that question assumes it to be so. But a building society is more than a friendly society, and the disputes which may arise between the members of such a society may and often do relate to considerable sums of money. When the legislature in the now repealed Act 6 & 7 Will. 4 c. 32 regulated benefit building societies, the 4th section was in these words, "That all the provisions of" 10 Geo. 4 c. 56 and 4 & 5 Will. 4 c. 40, the Friendly Society Acts, "so far as the same may be applicable to the purpose of any benefit building society, and to the framing, certifying, enrolling and altering the rules thereof, shall extend and apply to such benefit building society and the rules thereof in such and the same manner as if the provisions of the said Acts had been herein expressly re-enacted." There very soon arose a controversy as to the effect of this enactment. It was held, and the decision of this House in *Mulkern* v. *Lord* (1) is that it was held rightly, that the provisions of the Friendly Societies Acts as incorporated in the 4th section of 6 & 7 Will. 4 c. 32 applied only to such disputes as could arise between members of friendly societies as such, and which were of such a nature as might reasonably be referred to justices of the peace, that being the ultimate tribunal appointed by 10 Geo. 4 c. 56; and though I cannot bring myself to doubt that a dispute between the society and the member of a building society as to the terms on which his mortgage is to be redeemed, is a dispute between the society and him as a member of the benefit building society as such, yet I do not think it such a dispute as could arise between a friendly society and one of its members as member of the friendly society. I quite agree it is not a dispute which the legislature could be reasonably supposed to have intended to leave to justices of the peace.

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(1) 4 App. Cas. 182.

The last decision in point of date on this subject was *Reg.* v. *Trafford* (1) in 1854. In that case the opinion of the Court as I read it was that where the referees had jurisdiction at all it was exclusive jurisdiction, but that over such a dispute they had no jurisdiction. There was a decision in *Callaghan* v. *Dolwin* (2) that the justices had no power to state a case when acting under the Friendly Societies Act (3). This was decided in 1869.

Now when in 1874 the legislature repealed 6 & 7 Will. 4 c. 32, and were considering what provisions they would enact in lieu of it, they could not possibly know what this House would hold in *Mulkern* v. *Lord* (4) in 1879, but all concerned in building societies knew what had been decided on the repealed statute. I do not dispute that a few express words might have made it quite clear that the intention of the legislature was to say that disputes relating to mortgages and the redemption of them shall be referred and settled in no other way, the jurisdiction of the superior Courts being ousted, and that those express words are not there. But I think it is enough if we can collect the intention to have been so. And I think we can.

The Act 37 & 38 Vict. c. 42, by sect. 16 enacts what the rules of the building society "shall set forth." The 4th and the 9th subsections seem to me material. There must be in the rules provisions as to the terms on which mortgages may be redeemed. And there must be provisions as to whether disputes between the society and any of its members (which surely must include disputes as to the terms on which mortgages may be redeemed) shall be settled by reference to the Court (i.e. the County Court), or to the registrar or to arbitration. Those words exclude the notion of such disputes being disposed of in any fourth way, such as suing in a superior Court. I quite assent to what is said by Lord Cairns in *Mulkern* v. *Lord* (1), that though the rules provide that the jurisdiction shall be ousted that alone will not be effectual. It must be shewn that the legislature have so provided. Here the legislature have required that the rules shall so provide, which carries us a good way in saying what was the intention, more especially when knowing that the reason, or at least a principal reason, why the Courts of law had held that the provisions of the Friendly Societies Acts, though incorporated in 6 & 7 Will. 4, did not extend to disputes as to mortgages, was, that the reference there was to justices; they appoint a different tribunal. But it does not stop there; there are sections 34, 35, and 36. Sect. 35 provides that where the matter is one which, by the rules, should be referred to arbitration, and one party has not, within forty days, complied with a request to join in appointing arbitrators, or the arbitrators have not made an award, the Court (i.e., the County Court) may hear and decide the dispute. That seems to me equivalent to an enactment that no other Court shall, in such a case, do so. And the 36th section not only makes the determination by arbitrators, or by the Court or by the registrar, final and conclusive, but makes a proviso, I think, plainly suggested by the case of *Callaghan* v. *Dolwin* (2), that a case may be stated on any question of law, which goes very far to remove any argument that the legislature could not have intended to refer questions of law to such a tribunal.

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(1) 4 El. & Bl. 122.

(2) Law Rep. 4 C. P. 288.

(3) 21 & 22 Vict. c. 101.

(4) 4 App. Cas. 182.

The result is, that I come to the same conclusion as that come to by Pearson J. in *Hack* v. *London Provident Society* (3).

Since this opinion was printed and circulated I find that the Lord Chancellor takes a different view of the case. I need hardly say that I have carefully considered his reasons and that I now speak with diffidence. But I still entertain the opinion I have expressed, and, that being so, I move that the judgment be affirmed and the appeal dismissed with costs.

(1) 4 App. Cas. 182.

(2) Law Rep. 4 C. P. 288.

(3) 23 Ch. D. 103.

LORD WATSON:—

My Lords, I have come to the same conclusion with my noble and learned friend (Lord Blackburn), not without hesitation, because I am sensible of the weight of those considerations which have been so forcibly stated by the Lord Chancellor against the view which I have taken.

The provisions made by the Act 6 & 7 Will. 4 c. 32, and the Act 10 Geo. 4 c. 56, therewith incorporated, for the settlement of disputes arising between a building society and its individual members, differ from the enactments of 37 & 38 Vict. c. 42, and the question we have to consider, shortly stated, is, whether that difference is sufficient to take the present case out of the rule of *Mulkern* v. *Lord* (1) and previous decisions upon the same point.

By the statute of 10 Geo. 4 c. 56 s. 27, it is enacted that the rules of the society shall specify whether such disputes shall be referred to arbitrators or to justices of the peace; and in the event of reference being made to arbitrators, the enforcement of their award, which is declared to be final to all intents and purposes, is committed to the justices. Where such disputes are, by the rules, referred to justices of the peace, sect. 28 provides for the manner in which these are to be heard and determined, and sect. 29 further enacts that every sentence, order, and adjudication of any justices under the Act shall be final and conclusive. These provisions of the Act 10 Geo. 4 c. 56 are, by its terms, solely applicable to friendly societies, according to whose constitution, members make money contributions to the society, in return for which they themselves in case of sickness, or their representatives in case of their decease, receive certain payments, the amount of such contributions or payments, and the conditions attaching to them, being matters provided for by the rules of the society. It was not in the contemplation of those who framed the Act that a member and his society should, under the rules, stand to each other in the relation of mortgagor and mortgagee. The investment of the funds of the society on real heritable securities, or heritable property, is sanctioned by sect. 13, but it is obvious that a member borrowing on mortgage, under the authority of that clause, would not be transacting with the society in his character of socius.

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(1) 4 App. Cas. 182, 191.

The Act 6 & 7 Will. 4 c. 32, which was passed for the regulation of benefit building societies, incorporates the provisions of the Act 10 Geo. 4 c. 56, but only "so far as the same or any part thereof may be applicable to the purpose of any benefit building society, and to the framing, certifying, enrolling, and altering the rules thereof." The Act of William did undoubtedly contemplate that members of a benefit building society were, with a view to the erection or purchase of dwelling-houses, to receive advances from the stock of the society, to be secured by way of mortgage until the value of their shares had been fully repaid, together with interest and fines and other payments; and hence arose the contention that all disputes in regard to these mortgages must be settled by a reference to arbitrators, or to justices of the peace, in terms of the Act 10 Geo. 4. That contention was finally disposed of by the judgment of this House in *Mulkern* v. *Lord* (1). I understand the sole ratio of that judgment to be that, although the statutory machinery already provided for the settlement of disputes arising in friendly societies was made applicable by the statute of William to benefit building societies, yet its application was in the case of these societies limited to disputes ejusdem generis with those contemplated by the Act of Geo. 4. The Lord Chancellor (Earl Cairns), after pointing out the limited character and scope of the reference provided by the Friendly Societies Act of 1829, went on to say that it appeared to him to be impossible that the relative rights of the mortgagor and mortgagee, "and especially the rights of foreclosure and redemption, could be enforced or adjusted by such a reference to arbitration as is provided by 10 Geo. 4 c. 56 s. 27, and" he said "I therefore arrive at the conclusion that the provisions of that Act are not applicable to those purposes of a benefit building society which involve the adjustment of rights created by mortgage."

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The Building Societies Act 1874, under which the appellant society is incorporated, contains new enactments as to the tribunals by which disputes are to be determined. It provides (sects. 34 and 35) that the rules of the society may direct such disputes to be referred either to arbitrators or to the Registrar of Friendly Societies, who is also registrar under the Act, or to the "Court," i.e. the County Court of the district in which the chief office or place of meeting for the business of the society is situate. Arbitrators are (sect. 34) to be nominated, of whom a certain number, not less than three (such number to be fixed by the rules), are to be chosen by ballot in each case of dispute. It is declared (sect. 34) that the award of a majority of the number of Arbitrators so fixed shall determine the dispute, and that the award of the registrar, when the rules direct reference to be made to him, shall have the same effect. No executive power is given to the arbitrators or to the registrar; but it is enacted that in the event of either of the parties to the dispute refusing or neglecting to comply with their award, the "Court" shall enforce compliance with the same upon the petition of any person having interest. The "Court" is empowered (sect. 35) to hear and determine disputes, not only in the case of their being referred to it by the rules, but also in cases where one of the parties has failed within forty days to comply with the application of the other to have the dispute settled by arbitration, or where the arbitrators have refused, or for a period of twenty-one days have neglected to make any award. Lastly, it is enacted (sect. 36) that every determination of a dispute, whether by the arbitrators, the registrar, or the Court, shall be final and not subject to review, provided always that it shall be competent for any one of these tribunals to state a case for the opinion of the Supreme Court on any question of law, and that they shall each and all have power to grant to either party to the dispute such discovery as might be granted by any court of law or equity.

I do not think it can be inferred from the character of the tribunals thus constituted, and the nature of the powers conferred upon them, that it is impossible that the legislature should have intended to commit to their determination questions or disputes arising between an advanced member and the society in their relative characters of mortgagor and mortgagee. In 1865 the legislature had already conferred upon County Courts (28 & 29 Vict. c. 99, s. 1) jurisdiction to exercise the power and authority of the High Court of Chancery in all suits for foreclosure or redemption, or for enforcing any charge or lien, when the mortgage, charge or lien does not exceed in amount the sum of £500. There does not appear to me to be any à priori improbability that the legislature should in 1874 either intrust to these Courts the duty of determining such questions between a benefit building society and its advanced members, or authorize them to pronounce, when requisite, an order for foreclosure or redemption after the rights of parties had been ascertained by arbitrators or by the registrar.

But the important question still remains, whether the legislature has, by the enactments of the statute of 1874, directed questions which involve the adjustment of rights created by mortgage to be referred to these tribunals. It is of very little consequence that they should be capable of dealing with such matters, unless it plainly appear from the provisions of the statute that the legislature intended to give them jurisdiction.

Are, then, questions arising as to the redemption of a mortgage given to the society by an advanced member, as required by the rules, in order to secure the future payments becoming due by him as a member of the society, "disputes" within the meaning of sects. 34, 35, and 36 of the Act of 1874? That question must, in my opinion, be answered in the affirmative.

The 16th section of the statute expressly provides that the rules of the society shall set forth, inter alia, "the terms upon which shares may be withdrawn, and upon which mortgages may be redeemed." Now it appears to me that in making that provision the legislature must have had in view, mainly if not solely, mortgages to be granted in security for the repayment of advanced shares; and that the object of the provision is to secure to all who become members of the society full disclosure of the rights which they acquire and of the liabilities which they thereby incur.

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I am unable to regard the liability of an advanced member under such a mortgage as the liability of a stranger, and not as the liability of a member. By sect. 14, the liability of a member in respect of any share upon which an advance has been made is limited to the "amount payable thereon under any mortgage or other security, or under the rules of the society." The mortgagor is a member as regards the leading covenants of the mortgage, and I can see no reason for treating him quoad ultra as a mere stranger. In the case of every holder of shares upon which an advance has been made, it is an essential condition of his membership that he shall stand in the relation of mortgagor to the society as mortgagee. Unless he comply with that condition, he cannot become an advanced member, either in terms of the rules or within the contemplation of the statute. It therefore appears to me that every controversy arising between the society and a member upon whose shares an advance has been made, as to their respective rights under a mortgage executed in terms of the rules, is in reality a dispute between the society and a member within the meaning of the Act. I am strongly confirmed in that impression by the power which sect. 36 confers upon the arbitrators, the registrar, or the Court, to state at the request of either party a case for the opinion of the Supreme Court on any question of law, and also by the extensive powers of granting discovery conferred upon them by the same section. These powers appear to me to indicate that it was in the contemplation of the legislature that the arbitrators and other referees might in the exercise of their statutory jurisdiction occasionally encounter serious questions of law, in the solution of which it was proper that they should have the aid of the Supreme Courts of the country.

The reference clauses of the Act (sects. 34 and 35) speak of "disputes" generally, but it is obvious from the context that the expression is only meant to comprehend those disputes which arise between the society and its members, or persons claiming against the society as in right of a member. In the concluding enactment of sect. 34 such disputes are defined as "any dispute arising in a society under this Act;" and sect. 21 enacts that the rules are to be binding "on the several members and officers of the society, and on all persons claiming on account of a member or under the rules." A stranger transacting with the society must, of course, have regard to the powers of the society as constituted by its rules; but a dispute between him and the society would not, in my apprehension, be in any sense a dispute arising within the society.

It was maintained in argument that the disputes which, by the Act, are made the subject of reference are, by its context, limited to disputes arising under the rules. The enactment chiefly relied on in support of that contention occurs in sect. 34, which, inter alia, provides that "whatever award shall be made by the arbitrators, or the major part of them, according to the true purport and meaning of the rules of the society, shall determine the dispute." I should have attached great weight to that argument had I been able to read the words "according to the true purport and meaning of the rules" as having reference to the award of the arbitrators; but I am satisfied that they refer to the "major part" of the arbitrators, because the due selection of these arbitrators, and the number required to constitute a majority, can only be ascertained by reference to the rules.

I shall not refer in detail to the decisions which preceded *Mulkern* v. *Lord* (1). The ground of judgment upon which the House proceeded in that case had previously been adopted by Lord Cranworth in *Fleming* v. *Self* (2); but there are other cases which support the inference that such questions as those relating to the redemption or foreclosure of mortgages, in the case of benefit building societies registered under the Act 6 & 7 Will. 4 c. 32, ought not to be regarded as disputes arising between the society and its members in their capacity of socii. In the view taken by the House in *Mulkern* v. *Lord* (1) it became unnecessary to consider the point, so that the authority of these decisions is not impeached by that case. These decisions may be precedents upon the construction of statutory provisions which are akin to the enactments of the Building Societies Act 1874. But the question whether certain proceedings are to be regarded as

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(1) 4 App. Cas. 182.

(2) 3 De G. M. & G. 1030.

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disputes between the society and its members, arising within the society, appears to me in the case of each statute to depend upon the intention of the legislature, to be gathered from the whole provisions of the Act. In the present case the statute with which we are dealing differs from its predecessors as regards the tribunals to which disputes are to be referred, the powers conferred upon them, and the matters connected with the mortgages of members which are to be provided for in the rules; and as these new enactments have led me to form the opinion which I have already expressed, I do not conceive that I am fettered by decisions which involve the construction of other and earlier statutes.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 10th March 1884.

Solicitor for appellants: *Charles A. Russ.*
Solicitors for respondent: *Reep, Lane, & Co.*

[HOUSE OF LORDS.]

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March 3.

JOSEPH HORATIO LOVE AND ROBINSON FERENS . . . . APPELLANTS;

AND

CHARLES ERNEST BELL AND MARMADUKE CHARLES SALVIN . . . . RESPONDENTS.

Inclosure Act, Construction of—Mines—Manorial Rights—Support—Damage to Surface—Compensation.

An Inclosure Act enacted that allotments should be made to the persons having a right of common upon the waste of the manor, that is, to the owners of every separate ancient dwelling-house within the manor; that all right of common should be extinguished; and that the allotments should be held and enjoyed by the allottees by the same tenure and estates as the respective dwelling-houses: provided that nothing should prejudice, lessen, or defeat the title and interest of the lords of the manor to and in the royalties, but that the lords and their successors as owners of the royalties should for ever hold and enjoy all "rents, courts, perquisites, profits, mines, power of using or granting wayleave, waifs, estrays, and all other royalties and jurisdictions whatsoever" to the owners of the manor appertaining "in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made." Provided further, that in case the lords or any persons claiming under them should work any mines lying under any allotment, or should lay, make, or use any way or ways over any allotment, such persons so working the mines, or laying, making, or using such way or ways should make "satisfaction for the damages and spoil of ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil;" such satisfaction to be settled by arbitration and "not to exceed the sum of 5*l.* yearly during the time of working such mines or continuing or using such way or ways for every acre of ground so damaged or spoiled."

At the time of passing the Act there were no customs which enlarged or cut down the common law rights of the lords to work the minerals under the wastes of the manor. Under the Act an allotment was made in 1772 to a commoner in respect of an ancient freehold dwelling-house. At that time no house had been built upon the allotment. More than twenty years after a house had been built upon it, the minerals underlying it were worked by lessees of the lords of the manor so as to cause the surface of the land to subside, whereby the house was damaged to an amount exceeding the sum recoverable under the proviso. The land would have subsided if there had been no house. An action for damages having been brought against the lessees by the allottee's successor in title and by his tenant in possession:—

Held, affirming the decision of the Court of Appeal, that upon the true construction of the Act, the proviso for satisfaction did not apply to damage from subsidence; that there was nothing in the Act giving the lords the right to let down the surface; that the plaintiffs were entitled to have the house and land supported by the minerals, and to recover damages for the subsidence.

APPEAL from an order of the Court of Appeal.

The action was brought by the respondents against the appellants for damages caused to a house belonging to the respondent Salvin and in the occupation of the respondent Bell by the appellants' mineral working, and for an injunction to restrain the appellants. The Court of Appeal (Lord Coleridge C.J. Baggallay and Lindley L.JJ.) gave judgment for the plaintiffs, affirming an order of the Queen's Bench Division (Manisty and Williams JJ). The facts, which were stated in a special case for the opinion of the Court, are fully set out in the report of the decisions below (1). All the facts material to the present report are stated in the headnote.

Feb. 28. Sir *F. Herschell* S.G. and *F. M. White* Q.C. (*John Edge* with them), for the appellants:—

The respondents are entitled to no more compensation than that provided by the Inclosure Act; the Act expressly providing that the mining rights of the lords of the manor to work the mines should be exercised as fully as before the Act. Before the Act those rights were unlimited save by the obligation to leave enough pasturage for the commoners. The respondents have not shewn that the workings would have infringed on the rights of the commoners. The Act did not contemplate buildings or any use of the surface other than agricultural; but construing the Act most favourably to the respondents, there must be some limitation to the right of building; for if not the whole ground may be covered and no way left in to the minerals but through a building. The construction put by the Court of Appeal upon the compensation clause is unsound and leads to strange results; for if the compensation be intended only for temporary and

(1) 10 Q. B. D. 547.

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not for permanent damage, there is no compensation or redress for sinking shafts or any "spoil of ground" which is in its nature permanent. Who is to say what damage is "temporary" or "slight"? What is the test? This shews that the Act intended the compensation to be applicable to all damage however caused; and this is no hardship on the allottees, who are as well off as they were before the Act in their capacity as commoners. The present is substantially the same case as *Duke of Buccleuch* v. *Wakefield* (1), which the Court of Appeal did not effectually distinguish. Their judgment to some extent relies on the decision in *Blackett* v. *Bradley* (2), which was decided only on the authority of *Hilton* v. *Earl Granville* (3), and was wrongly decided, as was held in *Gill* v. *Dickinson* (4). The primâ facie right of the surface owner to support may be taken away by a contract or an Act: *Rowbotham* v. *Wilson* (5). Inclosure Acts are to be regarded as contracts between parties, and so construed. In *Roberts* v. *Haines* (6) the language was very different, and was applicable to the surface. Here it is not so; the language points to what is under the surface: *Aspden* v. *Seddon* (7).

[*Rylands* v. *Fletcher* (8), *Dixon* v. *White* (9), *Harris* v. *Ryding* (10), and *Smart* v. *Morton* (11) were also cited.]

C. Russell Q.C. and *E. Ridley* for the respondents were informed that notice would be given if the House after consideration desired to hear them.

March 3. EARL OF SELBORNE L.C.:—

My Lords, the authorities, which are numerous from *Harris* v. *Ryding* (12) and *Dugdale* v. *Robertson* (13) down to the recent case of *Davis* v. *Treharne* (14), which was decided in this House in 1881, have, I think, fully established the general law applicable to the

(1) Law Rep. 4 H. L. 377.
(2) 1 B. & S. 940; 31 L. J. (Q.B.) 65.
(3) 5 Q. B. 701.
(4) 5 Q. B. D. 159.
(5) 8 H. L. C. 348.
(6) 6 E. & B. 643; 7 E. & B. 625.
(7) Law Rep. 10 Ch. 395, 403.
(8) Law Rep. 3 H. L. 330.
(9) 8 App. Cas. 833.
(10) 5 M. & W. 60.
(11) 5 E. & B. 30.
(12) 5 M. & W. 60.
(13) 3 Kay & J. 695.
(14) 6 App. Cas. 460.

case of two owners, the one of upper strata, or the surface of the ground, the other of lower strata, containing minerals which are to be worked; and perhaps the most convenient way of putting the matter will be to read a few words from the opinion given by Lord Blackburn in *Davis* v. *Treharne* (1); "I think it must be taken as perfectly settled ground that as of common right the surface land has a right to be supported by subjacent strata of minerals. Although that is common right, it may be shewn,—the burden lying on those who wish to shew it,—that the person who has got the surface, obtained it either upon terms which would give him no right to support, he having accepted it and taken it upon those terms, or that before he got it the person from whom he claims, the owner of the surface, had parted with the right of support from below, in which case of course the owner of the surface could be in no better position than the person who sold it to him. In common right the person who owns the surface has a right to have it properly supported below by minerals, and if there are mineral workings under the surface, to have a proper support left for it by pillars." Whoever claims against that has the burden of proof thrown upon him.

In the same case, *Davis* v. *Treharne* (2), two pages later, Lord Blackburn deals with the question which there arose, and on this principle: that when the person on whom the burden of proof lies has to satisfy it, he will not be able to do so merely by shewing that there are words, however large, applicable to the right of working, and privileges connected with it, and compensation to be paid for working and for the use of those privileges, which may receive full effect consistently with the right of support. I will not refer in detail to that passage: it is in accordance with what is to be found in other authorities.

Starting with these principles we have to consider this particular case. It is, I may say, an ordinary case of inclosure of open or common lands, where the lord of the manor has certain rights: the right to the soil, and of course the right to the minerals below it, and the commoners have certain surface rights. The recital is, that by the inclosure this tract of waste ground which then yielded little profit might become "capable of

(1) 6 App. Cas. 466.

(2) 6 App. Cas. 467, 468.

considerable improvement." I shall have occasion to refer to that afterwards in connection with an argument which was suggested, that no improvement except by using the inclosed ground for agricultural purposes could be supposed to have been in contemplation. It goes on to allot to the lords in severalty certain plots and parcels of ground. Whether it be more or less that, upon the inclosure, is allotted to the lords can make no difference; it is equally a case of mutual considerations resulting in the apportionment of land to which the parties may be taken to have agreed, or have had determined for them by the authority which made the award. If it were needful to draw any inference from the fact that the greatest part of the land seems to have been allotted to the commoners, and a comparatively small part (if such is the fact) to the lords, the Dean and Chapter, the inference would be that the rights of the commoners in this case were very substantial, and that the rights of the Dean and Chapter, so far as the surface was concerned at all events, were small in comparison with them. However, that is not important. Then there follows the allotment of the residue to the commoners in respect of the houses, some freehold, some leasehold, to which the rights of common had been appurtenant or appendant, and they are to hold the allotted lands upon the same tenure on which they held those houses. The particular allotment in question being in respect of a freehold house is a freehold allotment, and we have to deal therefore with a freeholder having the ordinary rights of a freeholder to his allotment, except so far as there is anything in this Act to make them less than the ordinary rights.

The question, whether there is or is not anything of that kind in the Act, depends entirely upon the clause of reservation in favour of the lords of certain rights, and the proviso which follows that clause of reservation. The reservation, though it includes mines, is by no means confined to them; it is plainly a reservation of the pre-existing interest of the lords in the manorial rights and royalties and rights also in the soil which previously belonged to them as lords of the manor. It says: that nothing in the Act "shall prejudice, lessen, or defeat" their "right, title, and interest" to these things, but they and their successors "shall and may at all times for ever hereafter hold and enjoy all rents, courts, perquisites, profits, mines, power of using or granting way-leave, waifs, estrays, and all other royalties and jurisdictions whatsoever, to the owner or owners of the said manor, barony or borough, incident, appendant and belonging or appertaining (other than and except such right of common as could or might be claimed by them as owners of the soil and inheritance of the said moor or common so to be enclosed as aforesaid) in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made." So far, we have nothing but reservation of pre-existing rights, and that not in terms specially applied to mines and minerals although including them,—not in terms from which an intention to deal specifically with powers connected with those mines and minerals can be inferred,—but in terms which are as much applicable to anything else mentioned as they are applicable to mines; no doubt not less applicable to mines, than to the other things which are mentioned.

What is there in that clause of reservation which can possibly be relied on as depriving the freeholder to whom an allotment has been made of the right of support to his freehold? The only words which have been insisted upon as capable of having that effect are the words, "in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same," (which means, as I understand it, held and enjoyed those rights, titles, and interests which are reserved) "if this Act had not been made." Applying that to the mines, although it is not more applicable to the mines than to any other subject, I quite agree that it at least carries so much as this, that they were with the mines to have all usual powers and surface privileges for working them. Supposing in the clause of reservation these words had been expressly inserted, "reserving the mines and minerals with all usual powers and surface privileges for working them," would that have given a right to let down the surface? Would that have destroyed the freeholder's right of support? I apprehend that it clearly would not. As was pointed out in the case referred to at the Bar, *Duke of Buccleuch* v. *Wakefield* (1), it is impossible to understand such words as

(1) Law Rep. 4 H. L. 377.

reserving the previous rights of working exactly as they were without reference to the fact that an inclosure had been made, and as if the rights of common still continued to exist, and the rights of working were subject to the rights of common. The right given by those words must in that respect, although it is still a right to be held and enjoyed in a full, ample, and beneficial manner, nevertheless be a right to be held and enjoyed by the lord after inclosure, and against the owners of allotments, and no longer as against commoners.

But, let us consider what was the nature of the enjoyment which existed before the inclosure. I apprehend that before the inclosure, as much as afterwards, the lords, in the exercise of their powers as to the minerals, were subject to the principle "sic utere tuo ut alienum non lædas." They had not a right of working paramount to the surface rights of the commoners, they had only a right of working subject to the surface rights of the commoners, and any working which would substantially interfere with those surface rights would have been an unlawful working, and might have been restrained at the suit of the commoners. The only ground for saying that they might lawfully from time to time have let down portions, and perhaps ultimately the whole, of the surface is this: that they might have done so without injuring the surface rights of the commoners. They would not then have infringed upon the principle "sic utere tuo ut alienum non lædas." No damnum, no injury would have been suffered by the commoners, and therefore the lords might have been subject to no action, and to no restraint. But now the commoners, giving up the whole of their common rights, take in lieu of them these allotments. Why should not the lord in his altered position with his reserved rights be subject in respect of those allotments to the principle "sic utere tuo ut alienum non lædas" in its full extent, as much as he was before? I quite agree with what Baggallay, L.J., in the Court of Appeal suggested on that subject (1); namely, that the substituted rights are not given with power to the lord to take them away, which he could not have done with regard to the original rights, and that this reservation, if it stood alone, must be construed subject to the surface rights of the person to whom the allotments had been made.

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(1) 10 Q. B. D. 566.

Then we come to the words of the proviso. Now I quite agree that we should not be fettered by form if we find in substance in the proviso something tending either to enlarge, or to explain in such a way as to enlarge, the effect of the reservation; but still we must approach that proviso with due regard to the fact, that what we have already seen is a reservation only, not a grant, by Act of Parliament or otherwise, of privileges which a mere reservation would not have conferred; and that this proviso which follows has for its office to deal with the compensation to be made for the exercise of the reserved rights, so far as relates to those two particular subjects by which the surface might possibly be affected, namely, the working of the mines and the power of granting or using way-leaves, two subjects which throughout this proviso are separately kept in view.

It appears to me that here the principles already mentioned throw, at all events as strongly as before, upon the appellants, the duty of shewing that there are words which dispense, in their favour, with the general rule of law, and give them a right to let down the surface and deprive the surface owner of his ordinary right of support. I can find no such words. It is contended, however, that the usual powers of working mines do involve some right of interference with the surface; and that is contemplated by this proviso. But why should more be supposed to be contemplated? What word is there which shews more than this, that it is contemplated, that in the working of mines, as well as in the use of way-leaves, there may be some interference with the surface, in respect of which compensation is to be made? That would necessarily follow from the usual powers of working; but this consequence which is now sought to be established would not follow from the usual powers of working. Why, therefore, should it be supposed to follow, because the effects on the surface which are contemplated are provided for by way of compensation? The whole proviso, in my opinion, is satisfied by ordinary surface damage, such as might arise from the exercise of usual working powers.

The more the detail is examined, the more strongly am I led to the affirmative conclusion that this is what was meant, and all that was meant. The detail tends to repel, instead of to support, the appellant's construction. First of all, it refers to the working of the "mines lying within or under any of the allotments," and to "satisfaction for the damages and spoil of ground occasioned thereby." I pause for a moment to observe that the word "ground" occurs four times over in the passage; and it strikes me, to say the least, without dwelling too much upon it, as indicating ordinary surface damage to the surface of the ground, and not at all damage such as might happen in the case of buildings, with which we are now dealing. Therefore it confirms, as far as it goes, the view which, as I have said, I take of the clause as a whole.

But that is not all; for who is to receive this compensation? "The person or persons in possession of such ground at the time or times of such damage or spoil." It is manifest that the legislature thought that compensation ought to be made, and to the proper person. But is it to be for a moment imagined that in the case with which we are dealing, of injury to buildings erected upon the ground, which by possibility might be entirely destroyed, justice would be done by giving the compensation not to everybody injured, nor to the person chiefly injured, who would be the owner of the freehold, but to his tenant, to the person who might happen to be in possession at the time when the damage was done? There is then a limit, which limit is measured by the yearly value of "£5 for every acre of ground so damaged or spoiled"—a reasonable limit enough, probably, for such surface damage as might arise from the exercise of ordinary powers, which would not extend to the destruction of the surface, or of the buildings upon it, but to my apprehension a most improper, a most unreasonable, and a most unjust limit if it had been intended to take away the ordinary right of support. It was said upon this, "Oh, but it was never contemplated that there would be any buildings at all upon that ground—it does not appear that there were any at the time, and therefore we are to infer that the sort of improvement contemplated by the Act was the conversion of this moor-land into agricultural land and nothing more." But is it not extravagant to suppose that that was the only possible improvement of this land, there being no restriction whatever upon the mode of improvement which the persons into whose hands it might come might think expedient? The very principle of improvement by inclosure is that the land should be improved, to the extent of its capacity, by those persons who have the altered tenure, and who would have an interest in improving it. Even if it had been let as agricultural land, we are not to assume that it was all let out to neighbouring farmers who had already sufficient farm buildings for all purposes of agricultural cultivation. Even upon that hypothesis it cannot be imagined that it was out of contemplation in this improvement that there might be a residence for a farmer, a suitable house for him to live in, with stables, yards, and proper out-buildings, the damage to which buildings would be of a very serious kind, in no degree compensated under this clause. But the truth is that there is no ground for any such contention. The neighbourhood of the mineral works might make it a convenient and profitable mode, in using the land, to erect upon it cottages for persons employed in the mines; or the owner might wish to reside near the mines, and therefore erect a house for himself. Consequently, it is clear that we must take into account damage to buildings as well as other things. For damage to buildings this mode of compensation would be quite inappropriate; but it would not be necessary if the right of support exists.

No authority whatever was cited in support of the appellants' argument except the case of *Duke of Buccleuch* v. *Wakefield* (1), which appears to me to differ from the present in every material particular. In the first place, the words to be construed there were not words occurring in an enumeration of various rights reserved of different kinds, but they were words having direct and special application to the subject of mines, minerals, and mineral working; and in connection with that it was said that the lord was to retain his former status and to exercise his powers, not simply "in the same way as if the Act had not been made" (which words occur here), but the words were very emphatic and very remarkable, namely, in the same way as "if the lands had remained open and uninclosed, or this Act had not been passed;"

(1) Law Rep. 4 H. L. 377, 382.

that is to say, that for the purpose of giving effect to the reservation in the lord's favour, and the rights expressly conferred upon the lord by the Inclosure Act, the hypothesis of the lands remaining in an uninclosed state was, as between him and the surface owner, established by the Act; and that was pointed out as one of the reasons for the conclusion which was arrived at by one of the noble and learned Lords who then advised the House. But, secondly, there was not in that case a mere reservation, but there were words operating by themselves to confer, by the authority of the legislature, upon the lord, in respect of the exercise of those reserved rights, a great number of privileges expressly enumerated, and affecting the surface, which might or might not, but probably would not, have followed from a mere reservation. And Lord Hatherley, in advising the House as to its judgment, said that the enumeration of those rights, granted and not merely reserved by the Act of Parliament, was the reason which mainly weighed upon his mind in leading him to the conclusion to which he came, he finding in those words, not indeed in express language a power to let down the surface, but what he thought was practically equivalent to it, namely, a power totally and permanently to destroy the surface, and to take away the beneficial enjoyment of any part of it from the persons to whom the allotments had been made. And, thirdly, there was there (which was also much and justly relied upon) an absolute and unqualified clause of compensation; so that whatever might be the extent of the damage sustained, full reparation for that damage would be made to whoever might be the person who sustained it. All those things were relied upon, and all formed ingredients in that judgment, but all are absent here.

I need say no more, but I move your Lordships to affirm the judgment appealed from, and to dismiss the appeal with costs.

LORD WATSON:—

My Lords, the respondents are the owner and tenant of a parcel of a moor or waste within the manor of Elvet, allotted to the predecessor in title of the former, by statutory commissioners acting under an Inclosure Act of 1772, in respect of, or as appurtenant to his ancient freehold dwelling-house within the manor; and the Act provides that such parcels of land shall be "held and enjoyed" by the allottees, "in the same manner" and by the same tenure as the dwelling-houses, in respect of which the allotment was made, were then holden. The appellants are mineral lessees under the Dean and Chapter of Durham, the lords of the manor of Elvet, to whom are reserved, by the express terms of the Act, all mines within the limits of the divided waste, with power to work the same.

The respondents, being thus in right of the surface, are entitled to have it supported by the subjacent strata, unless the appellants can shew that, by the terms of the statutory reservation in their favour, the lords of the manor have the right to let it down, in the course of their mineral workings. The principles of law applicable to a case like the present are, in my opinion, precisely the same with those which govern the mutual rights of the respective owners of the surface and of the minerals below, when the plenum dominium of the land has been split into these two estates, by grants proceeding from a common author.

The Act of 1772 declares that nothing therein contained shall prejudice the title or interest of the Dean and Chapter in and to the "royalties" incident to the manor; but that they and their successors shall ever thereafter "hold and enjoy" (inter alia) all "mines," and that in as "full, ample and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made." After the judgment of this House in *Duke of Buccleuch* v. *Wakefield* (1), an authority upon which the appellants rely, I think it is impossible to hold that a reservation expressed in these terms is, per se, sufficient to give the lords of the manor a right to work their minerals so as to let down the surface. In *Duke of Buccleuch* v. *Wakefield* (1) Lord Chelmsford said that the Duke "must establish his right to work his mines, notwithstanding the inevitably injurious consequence to the respondents' surface, by proof either of a custom within the manor, or of an authority derived from the Act for inclosing the wastes of the manor." Here the existence of such a custom within the manor, as would sustain the right asserted by the appellants, is negatived in the joint case for the parties. It was no doubt decided in *Duke of Buccleuch* v. *Wakefield* (1) that his Grace had the right which he claimed, under the provisions of the special Inclosure Act; but there the clause of reservation, besides expressly authorizing a great variety of enumerated operations, both above and below ground, some of which involved the disturbance, if not the destruction of the surface, concluded with a general power to the mine owner to do all further and other acts whatever for getting the said mines and minerals, and carrying on the works thereof, and disposing of and carrying away the same, in as full and ample a manner, as if the lands had remained open and uninclosed, or the Act had not been passed.

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(1) Law Rep. 4 H. L. 377.

The terms of the reservation to the Dean and Chapter of Durham present a marked contrast to the broad and comprehensive terms of the clause with which the House had to deal in *Duke of Buccleuch* v. *Wakefield* (1), a clause which, to use the words of Lord Hatherley, conferred the "largest imaginable power" upon the owner of the mines; yet in that case the decision of the House was given in his favour, not because the clause per se enabled him to work so as to cause subsidence, but in respect that its powers were made subject to the condition that those who worked the mines, should make full compensation for all injury thereby occasioned to the owners of the surface. I concur in the opinion expressed by Mellish L.J. in *Hext* v. *Gill* (2), that "no one can read the judgment without coming to the conclusion that, if the provision as to compensation had not been there, the House of Lords, notwithstanding the strength of the other words, would in all probability have come to another conclusion." But the contrast between the compensation clauses in that case and the present is also very marked. There every person, whose interest in the surface was injuriously affected, was to be fully indemnified. Here, under the Act of 1772, no one is to receive compensation, except the occupant of the surface for the time being; the amount of compensation payable is restricted to £5 per annum for each acre of surface damaged; and all liability on the part of the mine owner to pay that restricted sum ceases the moment he desists from working. No compensation is provided

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(1) Law Rep. 4 H. L. 377, 406.

(2) Law Rep. 7 Ch. 717.

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to the owner of the surface, who is not in the personal occupation of it, during the time of working, though his property may be permanently injured; and, even if he does occupy himself, he is not to be compensated for any damage accruing (as for instance from subsidence) after the workings have ceased. A compensation clause, in these terms, so far from suggesting or supporting the inference that the mine owner was to have power to let down the surface, points to the very opposite conclusion.

I think it must always be presumed that a clause providing compensation was intended to cover the damage resulting to the landowner from the exercise of the powers previously reserved or granted to the owner of the mines. It is not the proper office, nor is it presumably the intention of such a clause, to define or extend the powers given to the mine owner; and it is frequently ob majorem cautelam, and in the interest of the landowner, expressed in comprehensive terms, so as to include every species of damage which may result from operations which are consistent with giving support to the surface. The clause may, nevertheless, be so expressed as to explain the character and extent of these powers, as was the case in *Aspden* v. *Seddon* (1), where the power reserved to the mine owner was to work the subjacent minerals without entering upon the surface of the lands. That power would not, of itself, have warranted letting down the surface; but it was made subject to the condition that the person working the mines should pay for all damages to erections on the surface occasioned by the exercise of the reserved power. Entry on the land being prohibited, it was a reasonable, if not a necessary, inference in that case, that the kind of underground working, contemplated and sanctioned, was such as would cause subsidence and injure buildings erected on the surface. But any such inference derived from the terms in which compensation is provided, must, in my opinion, be plain and unequivocal: otherwise general words, which were only meant to include every possible injury that could be caused by working without disturbance of the surface, might be construed as a power to let it down.

I agree with your Lordships that the judgment appealed from ought to be affirmed.

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(1) Law Rep. 10 Ch. 394.

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LORD BRAMWELL:—

My Lords, I also am of opinion that this judgment should be affirmed. Before the inclosure award the Dean and Chapter were owners of the soil, the surface, and all on it and under it—subject indeed to a right of common, the existence of which however seems to me immaterial. By that Act and the award they ceased to be owners of the soil generally, but remained owners of the minerals. If there had been nothing more in the Act, the Dean and Chapter would have had no right to touch the surface to get the minerals. And if all the right the Act gave them was to use such part of the surface as was necessary to get the minerals they would have no right in getting them to let down the surface. In other words, when the ownership of the soil generally and of the minerals is severed, the mineral owner has no rights as against the surface in getting the minerals except what the instrument of severance gives him, and if it gives the right to get the minerals without more, there is no right to let down the surface. This is well put,—indeed the subject generally and the questions that arise in this case are very well treated—in MacSwinney on Mines, Quarries, and Minerals, pp. 293 to 334.

The appellants in this case say that rights are given to the Dean and Chapter by the Inclosure Act not only to interfere with the surface to get the minerals but also to let it down, and they rely on the general words that the Dean and Chapter are to "hold and enjoy the mines in as full, ample, and beneficial manner as they could or might in case this Act had not been made." I cannot agree. For it is clear to me that that does not relate to working, but to property. The section begins that the title of the Dean and Chapter to the royalties incident or belonging to the manor shall not be prejudiced, lessened, or defeated by anything in the Act, "*but that*" they as owners of the royalties shall hold and enjoy all rents, mines, &c., to the owners of the manor incident, belonging, or appertaining. This relates to property. The power of working, so far as given, is in the next section. Supposing that the previous section would, without the subsequent, give the right claimed, it would give it without compensation. But the subsequent section being there shews what is to be compensated, and consequently limits the meaning which the former section might have if it stood alone.

The appellants further say that the power is to be found, not indeed in express words but as the result of the provisions for compensating the owner which it is said include all kinds of damage, and therefore subsidence. I do not know if the antecedent probabilities are in favour of the respondents or the appellants. If the appellants are right, inasmuch as they contend that they may let down and destroy a house, and admit that for that adequate compensation is not provided, it follows that until the minerals are exhausted and subsidence finished, the owner of the soil cannot use it to its best advantage. On the other hand, if the respondents are right the owner of the minerals can rightfully take half of them only, and might be stopped from taking anything the result of which would be subsidence of the surface. Either way there seems a loss.

We must examine the statute to see on whom it falls. And the problem we have to solve is a very common one, viz., what provision has been made for a case not contemplated? I say a very common one, for it continually happens that extensive words are used to comprehend cases not particularly contemplated. As I have said, the appellants say, not that the right they claim is given in express words, but that it is shewn by the provision for compensation for damage. I am of opinion, however, that the damage contemplated is temporary only, a damage to the person in possession, not to any reversioner or remainderman. The statute uses the present participles "working," "laying," "making," "using," and says that satisfaction shall be made for the "*damage*" and "*spoil of ground*" occasioned *thereby* to the person in possession at the *times* of such damage and spoil, and the damage is to be paid yearly *during the time of working* or continuing or using such ways for every acre so damaged. This I think clearly contemplates temporary damage during the working from which the person in possession alone suffers. It is impossible to say subsidence is included in this, for the subsidence may not take place till long after the working. Certainly, subsidence where a house or barn is let down is not contemplated. As to that, however, it may be said it is the folly of the landowner to build it. But even without any house being built the

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damage by subsidence is permanent. The level of the surface is destroyed, and if any gap or steep descent is made, the landowner would have to fence. Anyhow, subsidence is a permanent damage, and may be long after the working. There is no provision for compensating for that.

I am not insensible to the force of the argument of the Solicitor General. He says, if the argument for the respondents is right, inasmuch as the damage from a spoil bank or a shaft is permanent, either there is no right to sink a shaft or make a spoil bank, or the legislature has thought that compensation to the person in possession was enough, and if so, why is not the same true of subsidence, it being always the surface which is injured? This is a strong argument. It is singular that no express power is given to sink shafts or deposit spoil. Whether this matter was not thought of, or the right was supposed to be "incident" to the manor, or it was thought that damage to the reversion from shafts and spoil was not of sufficient consequence to the reversioner to require compensation to be provided, I cannot guess. Perhaps there is no right to sink shafts and deposit spoil. I think there is. But it does not seem to me that because no provision is made for compensation to the reversioner for one permanent damage there is therefore a right to inflict on him another one which may damage him only, and not the person in possession during the working.

In the result it seems to me that the compensation is to be for what the legislature considered damage to the person in possession during working; that if it has authorized shafts and spoil it has considered them damages to that person or sufficiently compensated for by payment to him, or forgotten the matter; anyhow, that it has not provided compensation for subsidence, and consequently has not authorized its being caused.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 3rd March, 1884.

Solicitors for appellants: *White, Borrett, & Co.*

Solicitors for respondents: *Munns & Longden, for E. Gleadowe Marshall, Durham.*

[HOUSE OF LORDS.]

MACKIE (PAUPER) . . . . APPELLANT;

AND

HERBERTSON AND OTHERS . . . . . RESPONDENTS

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Marriage Contract—Provision to Children of prior Marriage—Rule of Law—Intention of Truster—Trust—Irrevocability.

The general rule of law is that the Courts will not enforce a marriage settlement in favour of stranger volunteers who are not parties to the contract, on the ground that they are not within the consideration of the marriage. But when the persons who are within the consideration of the marriage take only on terms which admit to a participation with them others who would not otherwise be within the consideration, then, not the matrimonial consideration, but the consideration of the mutual contract extend to and comprehend them.

Where in an ante-nuptial contract of marriage, the intention of the owner of the property, a widow with children, was to make the children of the prior marriage and those procreated of the second marriage *a single class*, the members of which class were to take equally among them, subject to a power of apportionment, it is inconsistent with this intention to hold that some of the children take vested interests, as they come into existence, and that others take nothing except subject to a testamentary power: and in such a case the vested interest of the children of the earlier marriage is not contingent on there being children of the second marriage, for the effect and operation of the deed must be determined at the time it was executed.

A widow possessed of certain heritable and movable property, who had children alive by her first husband, by deed before her second marriage, to which her husband was a party, conveyed her property to trustees for behoof of herself "in liferent for her liferent alimentary use of the annual proceeds thereof allenarly and seclusive of the jus mariti of" her husband, "and not affectable by his or her debts or deeds or by the diligence of their creditors, and for behoof of the children procreated or to be procreated of" her body, "in such proportions and on such terms and conditions as she might appoint by a writing under her hand, which failing, equally among them share and share alike," &c., "in fee." The trustees entered into possession, and applied the income for the behoof of the wife. She died without issue by the second marriage, leaving testamentary deeds by which she cut down one of the children's interest to a sum much less than he would have taken under an equal division of her estate. He raised this action for declarator of his right to an equal share of her estate; and the sole question *now* for decision was whether the marriage contract was revocable:—

Held, reversing the decision of the Court below, that the provision of the marriage contract in favour of the children of the prior marriage was irrevocable.

APPEAL from the Second Division of the Court of Session, Scotland.

Mrs. Campbell, Mackie, or Gloag, had two husbands. By the first she had three children, the Appellant William Cross Mackie, and Alexander Mackie, who predeceased her unmarried and intestate, and Agnes Mackie or M'Cutcheon. These children were all alive in 1855. In this year Mrs. Mackie married John Gloag; they entered into an ante-nuptial contract of marriage, to which she and John Gloag alone were parties. By this deed, which was dated the 12th of December, 1855, Mrs. Mackie, in contemplation of her marriage, and with the consent of her intended husband, John Gloag, conveyed to trustees certain land and houses thereon, thirty-one shares of the Clyesdale Bank, thirty-seven shares of the Gorbals Gravitation Water Company, and a policy of insurance for £499 on her own life.

The deed declared that it was granted, and that the estate conveyed was to be held by the trustees for the end, uses, and purposes following, viz., for behoof of the said Mrs. Helen Campbell or Mackie, "In liferent for her liferent, alimentary use of the annual proceeds thereof allenarly, and seclusive of the jus mariti and right administration of the said John Gloag, and not affectable by his or her debts or deeds, or by the diligence of their creditors, and for behoof of the children procreated, or to be procreated, of the body of the said Mrs. Helen Campbell or Mackie, in such proportions and on such terms and conditions as the said Mrs. Helen Campbell or Mackie might appoint by a writing under her hand; which failing, equally among them, share and share alike, and their respective heirs and executors whomsoever in fee." It was further provided that Mrs. Mackie "should be bound, out of the aforesaid liferent of the property thereby conveyed, to pay, as she thereby, with the consent of the said John Gloag, bound and obliged herself to pay, the following sums: (1) The respective premiums of insurance upon the policy of assurance on her life, therein mentioned, regularly, as the same should become due; (2) the sum of £800, and interest to accrue thereon, being a debt due by the said Mrs. Mackie to the Clydesdale Banking Company, and in security of the payment of which they held the said shares in the Clydesdale Banking Company and the Gorbals Gravitation Water Company conveyed by this contract." On its execution the deed was delivered to the trustees, who took possession of the whole estate conveyed, and made up a title and administered it during the lifetime of Mrs. Gloag for her benefit.

The trustee's infeftment in the heritable estate was recorded in the register of sasines at Glasgow on the 26th of December, 1855, and the marriage contract itself was afterwards, on the 9th of February, 1875, recorded in the books of Council and Session at Edinburgh. The shares and stocks which, along with a policy of assurance on Mrs. Gloag's life, formed the movable estate conveyed by the deed, were transferred to the names of the trustees in the books of the several companies. Mrs. Gloag died on the 16th of March, 1881, survived by her husband John Gloag, who is still alive. There were no issue of their marriage. Mrs. Gloag during her lifetime received from the trustees the income of the trust estate, and she, on the other hand, paid the premium and interest which by the contract she undertook to pay. Shortly before her death Mrs. Gloag executed various testamentary settlements, by which she made a reduction of the provisions in the appellant's favour, with the result that his interest in her estate, apart from that of his only child, is finally limited to an annuity of £25 a year and a legacy of £300. These provisions are smaller than the interest which the appellant would have taken under an equal division of his mother's estate. The present action was brought by the appellant for reduction of the testamentary settlements so far as they dealt with the estate conveyed by the marriage deed to the prejudice of the appellant, and for declarator of his right to one-half of the heritable estate conveyed by the marriage contract in his own right, or otherwise to one-third of it in his own right, and to another third as heir-at-law of his brother Alexander, and to one-half of the movable estate as one of the two surviving next of kin of his mother. He also sought reduction on the ground of his mother's mental incapacity, but this conclusion he withdrew before the trial. Mrs. Gloag's general estate, which consists of her savings after her second marriage, is not now dealt with. The respondents to this action are the trustees of the ante-nuptial deed, and the trustees of the testamentary deeds. The husband John Gloag was called for his interest, but his curator bonis (he being insane) made no appearance.

The respondents, the trustees, resisted the action on the ground that the testamentary deeds must be given effect to, and that the provisions of the ante-nuptial contract relating to the disposal of the wife's estate, and so far as not dealing with the rights of the spouses and the children of the contemplated marriage were testamentary and revocable, and were revoked by the later testamentary deeds under which the respondents act. The appellant's pleas in law were inter alia:—

(1.) The pursuer's mother, Mrs. Mackie or Gloag, did not validly execute her power of appointment under the said ante-nuptial contract of marriage by the aforesaid trust-settlements or otherwise. More particularly, there has been no valid execution of the power, in respect that (1) no provision has been appointed to the pursuer, or at least it is illusory; (2) no provision has been appointed to the heirs and executors of the pursuer's deceased brother Alexander; and (3) beneficiaries under the truster's settlements, not being objects of the power, are made to share in the estate, the subject of the power.

(4.) The pursuer's mother having no power gratuitously to defeat, by her trust-settlements, the destination in the foresaid assignation by the said John Gloag, the pursuer is now entitled to the liferent of the lease and subjects thereby conveyed, and to the rents and profits thereof since his mother's death, the former liferenter, and the defenders, her trustees, are now bound to account to him therefor in satisfaction of his liferent right and interest.

The respondents' pleas in law were:—

(1.) The pursuer's averments are not relevant or sufficient to support the conclusions of the summons. (2.) The provisions contained in the marriage contract of Helen Campbell or Mackie and John Gloag in favour of the children of the said Helen Campbell or Mackie of her first marriage were not onerous or irrevocable, and the pursuer had and has no jus crediti therein, and, the said provision being testamentary and revocable, the present action cannot be maintained. (3.) The power of apportionment under the ante-nuptial contract of marriage libelled having been validly exercised by Mrs. Mackie or Gloag in the trust-settlement and codicils executed by her, the pursuer is not entitled to have the said deeds set aside, or to have the property falling under the said contract of marriage dealt with as if no apportionment had been made.

(4.) The said exercise of the said powers is not invalid in respect of the particular objections stated thereto by the pursuer, because (1) the pursuer takes a substantial interest under the said deeds of Mrs. Gloag; (2) it is not necessary to a valid exercise of a power of apportionment to include a deceased child in the scheme of apportionment; (3) that it is a lawful and valid exercise of the said power to apportion the funds to children in liferent, and grandchildren in fee; and (4) the apportionment is valid in respect of the provisions of 37 & 38 Vict. c. 37.

After argument of the cause had been concluded before the Lord Ordinary, His Lordship made avizandum with the cause and put the cause to the rolls, and allowed, on the 8th of July, 1882, the respondents to add a plea to the record, which is Plea No. 2 above.

On the 19th of July, 1882, the Lord Ordinary (1) pronounced the following interlocutor: "Finds that the pursuer is one of the children procreated of the marriage between the now deceased Peter Mackie and Helen Campbell or Mackie or Gloag: Finds that sometime after the death of Peter Mackie, his widow, Helen Campbell or Mackie, contracted a second marriage with John Gloag, and entered into an ante-nuptial contract of marriage with him, as set forth in the record: *Finds that the provision therein made in favour of the then existing children of Mrs. Mackie was testamentary and revocable, and conferred on them no* jus crediti *entitling them to challenge the deeds of settlement of the said Helen Campbell or Mackie or Gloag: Therefore sustains the second plea in law for the defenders: Quoad ultra, assoilzies the defenders from the conclusions of the action, and decerns. Finds the defenders entitled to expenses,* subject to modification (2).

(1) Lord Fraser.

(2) 10 Court Sess. Cas. 4th Series, 746; 20 Scotch Law Reporter, 486. The Lord Ordinary (LORD FRASER) is of opinion that the pursuer is not entitled to found upon the marriage contract as a ground of challenge of his mother's will. That contract, so far as he is concerned, was simply mortis causa and revocable. As respects any children that might have been procreated of the marriage the provision was *in obligatione*, and could not be defeated by any gratuitous deed of the parent. But so far as concerns the children of a former marriage, there was no onerosity in the matter. They were merely heirs *in destinatione*, and their provision could be recalled like any other legacy. Thus there may be, in the same deed, persons called as beneficiaries to the same fund, who may have very different rights, and so the children procreated and the children to be procreated may have, the first only the rights of a legatee, while the others have a jus crediti which no gratuitous deed can defeat. If the provision had been to the children of the marriage, whom failing to the children of Mrs. Gloag by her first marriage, there can be no doubt that the

The cause was heard in the Second Division before the Lord Justice-Clerk, Lord Craighill, and Lord Rutherfurd Clark (Lord Young being absent).

While the cause was at avizandum, the Court, before giving judgment, desired further argument, and ordered the case to the roll, when counsel were heard upon the question,—What effect

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latter must submit to any gratuitous defeasance by their mother of the provision, and the case is not altered, although the clause does not call them by way of substitutes, but confers upon them an equal share with the children of the marriage. The law is stated very well by Bankton (i. 5, 15)—"Though the children are creditors in such provisions with respect to gratuitous deeds made in contravention thereof, yet this extends not to the substitutes, failing children; for the children only are *in obligatione*, in whose favour the provision, as binding, was made, the intention of parties being only to secure their interest; but other substitutes are only *in destinatione*, heirs by simple destination, and so may be disappointed of their hope of succession at pleasure as any other heirs by naked destination." See also Erskine, iii. 8, 39; *Lang* v. *Brown*, May 24, 1867, 5 Court Sess. Cas. 3rd Series, 789; *Macleod* v. *Cunninghame*, July 20, 1841, 3 Ibid. 2nd Series, 1288, *aff.* 5 Bell's App. 210.

No doubt there may be cases where a provision in a marriage contract not in favour of children of the marriage must be held to be irrevocable. If, for example, there should be a destination in the contract, after heirs of the marriage, to the wife's heirs, or one-half to her heirs and one-half to the husband's, the wife is understood to have contracted for the destination to her own heirs, as well as for that to the children of the marriage, and consequently the husband cannot himself gratuitously change the destination to the prejudice of the wife's heirs. See Bankton, i. 5, 16; *Kinsman* v. *Scot*, M. 12,980; *Yorkston* v. *Simpson*, M. 12,981. But in the present case this qualification of the rule does not apply, for it is the wife herself who makes the alteration upon the destination in the marriage contract, and this in reference to property of her own. She was under no obligation whatever to make any provision for the children of her first marriage, and when she did make it in her marriage contract with Gloag she was under no obligation to abstain from revoking it. Gloag made no provision for her by the marriage contract, and it cannot be held that he stipulated for the benefits conferred by his wife on the children of her first marriage as a part of the bargain entered into with her. The mistake that has been committed in this case is in supposing that the pursuer has a jus quæsitum under his mother's marriage contract with Gloag, in the same way as children of that marriage would have had.

If it had been necessary, the Lord Ordinary would have been prepared to state the reasons upon which he holds that the Act 37 & 38 Vict. c. 37, applies to Scotland, and therefore that the execution of the power of appointment by Mrs. Gloag was not inept, because it made no provision for the heirs of Alexander Mackie, who predeceased his mother.

the delivery of Mrs. Gloag's marriage deed to the trustees under it, their infeftment on it, and the possession of the marriage estate following upon it, had upon the question raised and decided by the Lord Ordinary as to the testamentary and revocable character of the deed, quoad the rights of the appellant under it? Lord Young was present, and heard the additional argument upon that question.

On the 9th of March, 1883, the Court pronounced this interlocutor (1) (Lord Rutherfurd Clark dissenting).

(1) LORD YOUNG: — The leading question in the case, and the only one which I find it necessary to consider, is, whether the marriage contract of the 25th of December, 1855, between Mrs. Mackie and her second husband, Mr. Gloag, imports an irrevocable gift by her to her children by her first marriage of certain property which she thereby conveyed to the marriage trustees? It is clear enough that these children being strangers, in the sense of not being proper objects of the contract, take no right by virtue of the contract between the spouses, or in respect of the onerosity of the deed. If they have any right, therefore, it is not by onerous contract, but by gift, so perfected as to be irrevocable by the giver. The law on the subject of gift is well settled, and is this—That while a completed gift cannot be recalled, an imperfect gift is not enforceable, however clearly it may appear that it was at one time intended. A gift may be completely and so irrevocably made by delivering the subject of it to the donee animo donandi, which is the most obvious case, or by delivering it with the same animus to a trustee for the donee in such manner as to put it beyond the power and control of the donor, or by the donor constituting a trust in himself for the donee, which, though a possible, is not a familiar case, and one which need not now be considered.

The question then is—Does this marriage contract, with what followed on it, import a complete gift to the children of Mrs. Mackie by her first marriage?

The radical question in all such cases is, whether or not an irrevocable gift was intended by the alleged donor? although this question must, of course, be determined in the case of a deed relied on as a deed of gift by the ordinary rules of construction—keeping in view the character and purpose of the deed, which may have, and I think here has, an important bearing on the matter.

The deed here relied on as a deed of gift is a marriage contract, to which the alleged donees are strangers in the sense which I have explained. But although it was quite possible thereby to make an irrevocable gift to them, it is material to have in view the character and purpose and proper object of the deed in construing the language to which this effect is attributed, as being presumably according to the meaning and intention of the party using it.

It was according to the contract, on which the marriage between Mrs. Mackie and Mr. Gloag followed, that the former should secure certain property of hers for herself in liferent, and the children of the marriage in fee, by vesting it in trustees with directions to that end, and that the security should be completed by Mr.

"The Lords having heard counsel for the parties on the reclaiming note for the pursuer against Lord Fraser's inter-

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Gloag renouncing his jus mariti over it, for I think it clear that his jus mariti was renounced with respect to the whole property, and not with respect only to the income. Beyond this the contract of the spouses does not extend. The deed provides for the interests of the wife's children by her first marriage, but with respect to them there was no contract, or, to use Mr. Erskine's quaint language, only a contract by Mrs. Mackie with herself alone. She had no occasion to contract with these children, or with Mr. Gloag for them, beyond this, that she should be at liberty to introduce them to share her property with the children she might bear to him, equally or otherwise as she should eventually determine. That they should so share, whether she desired it or not, and that failing children of the marriage they should have the whole irrespective of her wishes was assuredly not matter of contract between her and Mr. Gloag. There may, nevertheless, be a complete and irrevocable gift to them by herself, irrespective of Mr. Gloag altogether; but in considering whether there is or is not, it is, I think, material to notice that the only language relied on as importing it is that of the contract between her and him, and that such gift is certainly not matter of contract between them. It is not merely that the language occurs in the deed of contract, but that it is part of the language in which the contract regarding the children of the marriage is expressed, and has an important meaning and effect in qualifying and limiting her obligation by that contract which is completely satisfied without the notice of an irrevocable gift to the children of her first marriage. Mr. Gloag was willing, and so contracted, that she should be at liberty to introduce her children by her first marriage, or by a third marriage, to share her property with the children she might bear to him, but a gift to these other children of hers, irrespective of her wishes and emerging circumstances, was assuredly not matter of contract with him, or, I should think, according to her intention.

The vesting of the property in the marriage trustees, and the limitation of Mrs. Mackie's right to a liferent, was essential to the security and preservation of the property for the purpose of the contract, and so was matter of contract. But the purpose of the contract being satisfied, or at an end—as it was completely on the dissolution of the marriage without issue—the trust, according to a familiar rule, resulted to the truster, viz., Mrs. Mackie herself, or failing her, to her heirs, legal or voluntary, subject of course to any trust direction without the contract, for there was no longer any operative direction within it. With respect to the direction to the trustees, ultra the contract, to hold for the children of the truster's first marriage, or it might be of a third, failing children by Mr. Gloag, I think this was a simple and gratuitous destination by her (which might of course be made by trust direction), and as such alterable at the truster's pleasure.

It has been my intention to express myself so as to distinguish the case in hand from that where a party by a delivered deed conveys his property directly to another, reserving his liferent, or conveys it to trustees for himself in liferent and another in fee. In either of these cases the deed would locutor of the 19th of July last—refuse the same: Adhere to the said interlocutor. Find the defenders entitled to additional

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probably import an irrevocable gift, and certainly would in the absence of circumstances affording any other reasonable explanation of the intention of making it. The deed here is a marriage contract, with what is substantially a destination of property ultra the purpose of the contract. It is complicated with the introduction of strangers to share property with the proper objects of the contract, but failing these objects (which is according to the fact as it happens) the destination to these strangers is a pure and simple destination ultra the contract—just as it would have been had it been in words—that failing children of the marriage contracted about, the property should go to the children of its owner by a former or subsequent marriage. Such a destination, according to the authorities, imports no irrevocable gift, but only a simple and alterable destination. It is reasonable to assume that this marriage contract was prepared by the conveyancer, and its meaning and effect explained to the parties, with reference to the rule of law settled by these authorities. I am therefore of opinion that the gift contended for by the pursuer was not intended, and that the deed relied on, being construed according to the established rules of law, does not import it.

LORD CRAIGHILL:—There are two grounds upon which this interlocutor has been impugned. The first is, that the provision in favour of the children of the first marriage was irrevocable, because it was a marriage contract provision; and the second, that apart from this consideration, and viewing the provision as a mere donation, it was irrevocable, the deed conferring it having been delivered to the trustees for behoof of all concerned, the truster being thereby divested and the property conveyed (with no burden, and under no condition other than the truster's liferent) being thereby transferred to the beneficiaries of the trust. With reference to the first of these contentions, my opinion coincides with that of the Lord Ordinary. Onerous provisions, or provisions which are matters of contract, are irrevocable; but those which are not may be revoked, even though they occur in an ante-nuptial contract. The parties to whom they are given are introduced into the deed, not in fulfilment of any purpose influencing the execution of her deed, but incidentally and merely of goodwill; and the right, such as it is, is in its character purely testamentary. If unrevoked it will take effect, but it may be revoked should the maker of the deed be so disposed. The contrast between contract rights and those which are not is very well illustrated on the present occasion. If the trust created by the marriage contract, through delivery of the deed to the trustees, had not been brought into operation, the provisions for the children of the second marriage would all the same have been irrevocable. The property which was intended for them might, in consequence of the deed remaining latent, have been exposed to risks, but the benefit conferred could not be revoked. The grantor would have remained, whatever she might have done, debtor to the contract beneficiaries. On the other hand, it is just as plain that, if the deed had not been delivered, the interests, such as they were, created in expenses. Remit to the auditor to tax the same and to report: and remit the cause to the Lord Ordinary with power to decern for the taxed amount of the expenses now found due.

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favour of the children of the first marriage would have remained within the power of the truster. Nobody had contracted upon their account, and as through non-delivery the provisions of the deed, so far as they were concerned, were left in the granter's power, they could not successfully have challenged the act whether the disposition had been revoked or destroyed. In other words, the conveyance to them or upon their account was voluntary or testamentary, and what is so given, where the thing given has not been delivered, may at any time be recalled. These are the views of the Lord Ordinary. They are also mine, and in my opinion they are fully confirmed by the decisions in *Lang's Case* and in the case of *Mitchell's Trustees*, so frequently referred to in the course of the argument from the bar. No doubt in those two cases the deeds the effect of which was presented for decision were upon the face of them testamentary deeds, not marriage contracts; but so far as the result depends merely upon the terms of the deed, and not upon its delivery, the principles by which the question must be decided appear to me to be identical.

The answer to the second question must, I think, also be given against the pursuer. The terms of the deed cannot by mere delivery be altered. It remains on the delivery such as it was when delivery occurred. Were the pursuer able to shew that, upon the terms of the deed there was conferred on the children of the first marriage a right intended to be an irrevocable right, then delivery of the deed would accomplish irrevocability; but if there is nothing to shew that according to the intention of the maker the intention was irrevocable, revocability will not be taken away by delivery. The case of *Smitton* v. *Tod* (2 Court Sess. Cas. 2nd Series, 225) establishes this proposition, were proof of its soundness required. In pursuing this inquiry let us consider, first, what was the character of the right conveyed to the children of the second marriage, whose rights were created and protected by the contract. That right was conditional, but irrevocable. It could not be revoked, but whether the estate should be carried from the the truster depended on the existence of children of the second marriage.

So long as that was in suspense there was only a conditional divestiture of the truster, and the trust right was nothing but a contingent right superinduced on her radical right. To me it appears there is nothing in the deed which suggest that according to the intention of the truster as there, or indeed as anywhere, disclosed, the right of the children of the first marriage should be unconditional, while that of the children of the second marriage, whose rights were matters of contract, was only to be contingent. And the contrary is, in the circumstances, the natural presumption. The right of those who are under contract was the highest right conferred under the trust, and once it appears that the divestiture for these beneficiaries was only a conditional divestiture, the power of the granter to deal with her estate under the radical right is plain. If the deed had been executed, not in contemplation of marriage merely, but also for

On the 17th of May, the Lord Ordinary pronounced this interlocutor as to expenses:—

"*The Lord Ordinary approves of the auditor's report on the*

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the purpose of making a settlement upon the children of the granter's first marriage, what the pursuer contends for would have been accomplished. But there is no such purpose specified in the deed. The pursuer says, however, that it is to be inferred from several circumstances. The first of these is that children of the first and children of the second marriage are specified together, as those for whom the trust as regards the fee of the property has been constituted. And there is no doubt that this is a peculiarity, for a similar form of expression is not to be met with in any of the decided cases, but, once it is ascertained that children of the first marriage were not parties to the contract, this specialty becomes immaterial. Those beneficiaries were, in reality at the time only the heirs of the granter. If they had been so described, admittedly the pursuer's contention could not have been successfully maintained, there being on this point the authority of many decided cases. But the principle underlying those decisions is equally applicable on the present occasion. The pursuer also says that the reservation of the power of apportionment suggests that the provision in favour of the children of the first marriage was irrevocable. The circumstance is not immaterial, but it is far from being conclusive. The purpose of this reservation would still remain after the provision to the children of the first marriage had been recalled. The necessity or the expediency of apportioning among the children of the second marriage, should such exist, was a thing for which provision might reasonably be made, and this consideration affords full satisfaction of the terms of this part of the deed.

On the whole, my view on this part of the case is that delivery left the rights of the children of the first marriage as they were upon the face of the deed. They are there, according to its true reading, not creditors, but simply beneficiaries at will, and what was given to them, as such, might be, and, as I think, was, subsequently recalled by the testamentary writings left by the truster for the regulation of her successors.

LORD RUTHERFURD CLARK:—Mrs. Gloag died in March, 1881. She had no children by her second marriage. She left certain testamentary deeds by which she disposed of the estate settled under the marriage contract trust. The pursuer contends that these deeds exceed her power of appointment. The defenders maintain that they are within that power; but they further say that inasmuch as there was no child of the second marriage, Mrs. Gloag was not divested of the fee, and had an absolute right of disposal. It is on this last point that the Court is at present called to give its judgment.

In considering this question it must be observed that the marriage contract does not in any sense bear to be a testamentary deed. It does not profess to convey the whole estate belonging to the granter, nor the whole estate which should belong to her at her death. Nor was its effect suspended until that event should occur. On the contrary, the marriage contract was a *defender's account of expenses, No.* 16 *of process, as taxed at the sum of* £112 10*s.* 4*d.*; and having heard counsel on the question

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de præsenti conveyance of certain specified estate, and it was intended to have and did have an immediate effect. It divested Mrs. Gloag of the estate therein contained, and vested it in the trustees for the purposes of the trust. Ex figura verborum she retained no interest in the estate beyond an alimentary liferent.

As Mrs. Gloag was thus divested of her estate by de præsenti conveyance, delivered to and accepted by the trustees, I do not see how she can retain any interest beyond what she takes under the trust itself, unless the trust purposes fail or unless the trust conveyance is revocable. In the former case the trustees hold for the truster, for the truster can never be divested except by the conveyance of the beneficial fee to some other person. This can never happen when there is a failure of the trust purposes. In the latter case, the truster can revoke the trust conveyance.

The trust can only fail either through a failure of beneficiaries, or by reason of some condition which suspends or resolves it. In this case there is no failure of beneficiaries; for the children of the first marriage, who are beneficiaries, existed at the date of the trust, and are now claiming the benefit of it. If it fails, it must be because it is conditional, and because the condition has not been purified.

The defenders argued that it was conditional on the existence of children of the second marriage, and that it lapsed or became ineffectual because none were born. The argument is based on this one consideration, that it was granted in contemplation of the second marriage, from which it is contended that it could have no effect as a divesting deed unless there were children of that marriage. But the cause of granting, or, in other words, the reason why the deed was executed, does not, in my opinion, express or imply any condition, suspension, or resolution of the conveyance or of the trust thereby created. It is a mere recital of the consideration which led to the act; but it does not make it the less absolute.

It is said that the only purpose which the truster had in view was to make a provision for the children of her second marriage, for whom alone there could exist an onerous cause of granting. I concede that for them only there was an onerous cause, and that as regards the children of the first marriage the deed must be considered as a gift. But I fail to see why the circumstance that one set of the beneficiaries take for onerous causes, while the others are donees, can attach or imply any condition. On the contrary, the inference seems to me to be all the other way. The truster was contemplating a second marriage. She had children, and others might be born. Her marriage would have a material effect on her estate; for, in the absence of provision to the contrary, the rents of her heritable estate and the fee of her movable estate would pass jure mariti to her husband. She had to consider what she would do. What she did was to divest herself of the estate, reserving only a liferent from which the jus mariti of her husband was excluded, and to give the fee to her children born and to be born. This seems to be a perfectly rational act, and so far from being conditional, it required to be absolute in order to be effectual.

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of modification (1) of the expenses found due to the defenders by the interlocutor of the 19th of July, 1882. Modifies the taxed

For it is to be observed that if the trust purposes fail, so that the truster is the fiar of the trust estate, she was the fiar of it from the date of her marriage. It could not, of course, be known so long as there was a possibility of issue whether she was fiar or not. But if the failure of issue of the second marriage means a failure of the trust purposes, and therefore of the trust, it was ascertained on the failure of issue that the truster had never been divested of her estate, or, in other words, that though she was divested of the title the trustees had all along held for her as the sole beneficiary. But if this were so, the necessary consequence would be, that in so far as the estate was movable it passed to the husband jure mariti, for, in my opinion, the jus mariti is excluded only as regards the income, and I conceive that nothing could be more contrary to the intentions of the truster, and I cannot imply a condition which I think would defeat an important purpose of the trust, and for which, in my opinion, there is no warrant but the merest conjecture.

It is that the exclusion applies to the fee. I cannot so read the deed. The words of exclusion are to be found only in that part of the deed which deals with the liferent, and are, I think, expressly limited to the liferent. From the character of the deed as effecting an immediate divestiture of the truster there was no necessity, or indeed room, for any wider exclusion.

Further, it is urged that the truster undertakes very serious obligations in the form of paying out of her liferent the premium of the policy of insurance, and the debt due to the bank, and that it is impossible to hold that she undertook such obligations in favour of children already born. I can only say that she did undertake them, and that I can find in the trust deed no indication that she did not undertake them in favour of all the beneficiaries. The trustees were the creditors in the obligations and were entitled to enforce them for the maintenance and protection of the trust estate. The interest of the beneficiaries, subject to the reserved power of appointment, is, I conceive, identical in quantity and quality.

The next question is, whether the truster could revoke? It is conceded that in so far as regards the children of the second marriage she could not; but it is contended that she could revoke as regards the children of the first marriage. There is involved in this point a twofold consideration, viz., whether her power of revocation was limited to the case of there being no children of the second marriage, or whether, if there were, she could revoke the interest of the children of the first marriage.

On the latter of these alternatives I can see no room for doubt. If a child had been born of the second marriage he would have taken at his birth a right of fee. But, as I have already said, the interest of both sets of children is identical, and if the interest of the one cannot be revoked, it seems to me to follow that the other is equally irrevocable. Neither take their rights by testament, but by

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(1) The modification of expenses, being in respect of the additional plea for the respondents being added to the record.

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amount of said account of expenses at the sum of £92 10*s.* 4*d.*, *for which decerns against the pursuer.*"

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a de præsenti conveyance, conceived in precisely the same terms as to both, although there may be an onerous consideration in the one case and none in the other.

In considering the other alternative I assume from what I have already said that the trust conveyance is subject to no condition or contingency. There was therefore an absolute conveyance in trust for the children already born, as well as for those that might be born. The conveyance was in no sense testamentary, because it was delivered during the lifetime of the truster, because she was thereby divested of her estate, and because an immediate fee is created in the beneficiaries.

I cannot look on the conveyance as anything else than an irrevocable conveyance in favour of the trustees for the benefit of existing beneficiaries. We have some examples of such a conveyance in our books, as, for instance, in *Turnbulls* v. *Tawes* (1 W. & S. 80), and *Smitton* v. *Tod* (2 Court Sess. Cas. 2nd Series, 225). Both of these cases are, I think, of authority, and I adopt entirely the view which is taken of them by the Lord President in *Spalding* v. *Spalding* (2 Court Sess. Cas. 4th Series, 237). The present case is, I think, stronger than either, for if the trust conveyance was to be considered to be testamentary, in which case alone it would be revocable, one object of it at least would be defeated by letting in the right of the husband jure mariti.

I am quite aware of the rule that marriage contracts are to be regarded as testamentary in so far as they contain dispositions beyond the purposes of the marriage; but I do not think that that rule can hold when the deed operates an immediate divestiture in favour of existing children who are by the deed as much favoured as the children of the contemplated marriage. In this case I hold that there was an instant and irrevocable gift in favour of children born and to be born which was completed as soon as the deed was delivered to the trustees. As soon as the title of the trustees was made up nothing remained to be done in order to the full completion of the gift. I do not examine the note of the Lord Ordinary, because it is obvious that the point on which I think that this case should be decided was not stated to him. For he deals with rights in obligatione or destinatione only, and not under an absolute conveyance.

THE LORD JUSTICE CLERK:—I have certainly found this case to be very perplexing, and my opinion has more than once varied. But I have come at last to concur with the majority of your Lordships, and I shall explain in a few sentences the ground of my opinion.

It has been decided in many cases, from the case of *Sommerville* (19 F. C. 730) in 1819, down to the present time, that where a conveyance embraces different interests, some of which are in their nature onerous and others purely gratuitous and testamentary, precautions taken by the granter, by delivery to and possession by trustees, will be attributed to the onerous obligations in the conveyance, and will not necessarily convert the gratuitous and testamentary grant into one which is irrevocable. This may be held now to be settled in the case of gratuitous substitution in favour of third parties

The appellant appealed against the whole of the interlocutor of the Second Division, and those portions of the Lord Ordinary's interlocutors printed in italics.

March 3, 4, 6. *Shiress Will*, Q.C., and *MacClymont*, for the appellant, contended that the question here came to simply this, was the ante-nuptial deed testamentary or not? The whole facts and construction of the deed indicated clearly that Mrs. Gloag *intended* the interest given to the children of the first marriage to be irrevocable. She retained but a life interest, excluded the jus mariti of the husband, and took the proper steps to give effect to this irrevocable interest by delivery and possession to trustees. It was therefore a complete and perfect gift immediately effected which the truster could not afterwards recall at pleasure. The general rule is that the children procreated of the marriage have the fee, but here the children of the first marriage were given precisely the same interest as the children to be procreated, subject no doubt, to the exercise of the power of apportionment.

The rule as to what is not a gratuitous grant applied in Scotland as in England. There were no words in the deed indicating that any part of the gift might be recalled, either on the ground of a power or as testamentary. In *Turnbulls* v. *Tawse* (1) a mother who was vested in the fee of certain subjects, having conveyed them to trustees for the purpose, inter alia, of paying a specific debt, an annuity to herself and conveying the free residue to

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or strangers adjected in the same conveyance to onerous and irrevocable provisions. The peculiarity of the present case is, that the rights of the gratuitous grantees are, by the conveyance, in some measure coincident with those of the contingent creditors—the possible children of the second marriage. This provision was from the first gratuitous and testamentary in its nature; and when the onerous and irrevocable provisions of the settlement failed, what remained was a purely testamentary conveyance.

I do not look on the conveyance as conditional. While it remained unrecalled it was absolute, and would have taken effect according to its terms, had it not been revoked. The question does not relate to its conditional but to its revocable character; and being, as I think it was, essentially gratuitous and testamentary, and therefore revocable, I can find no reason for concluding that the granter meant to divest herself of so large an amount of property in the event of the only onerous cause of granting it having failed.

(1) 1825. 1 Will. & Sh. 80.

her children's nomination, on which infeoffment followed; and having thereafter executed a supplementary trust deed authorizing the trustees to dispose of the subjects for a larger debt, it was held by this House, that the second deed so far as it was inconsistent with the original trust deed and the interests of the children must be reduced at their instance. There Lord Gifford said (1), "If there is nothing to be collected from the first instrument to shew that she intended to reserve to herself that disposition which she executed under the second deed, then the first must be held valid trust-dispositions giving to the children a vested interest in the residue."

The doctrine of this case was followed in *Smitton* v. *Tod* (2), where a father, on a narrative that there had been no written contract of marriage, executed a conveyance of his whole estate heritable and movable to trustees, to pay his debts, to provide an alimentary annuity to his wife, and on her death an alimentary annuity to himself; and after the death of the longest liver, the trustees were to hold the subjects equally for behoof of the children born of his present or any future marriage; the deed was delivered and the trustees took infeoffment. Smitton afterwards, with the concurrence of his wife, executed a revocation, it was held, that quoad the children, the deed was irrevocable. There *Sommerville* v. *Sommerville* (3) was distinguished by Lord Mackenzie. The meaning of *Leckie* v. *Leckie* (4) was that delivery by itself was not conclusive that all the purposes of the deed were irrevocable. There Leckie executed a deed disponing an heritable subject to his youngest daughter Elizabeth and her husband and their son, reserving his own liferent. By the same deed, he assigned to the same persons, all his moveables at his death; and, of the same date, he granted them a bond for £400 which he delivered to them. This disposition contained a clause dispensing with the delivery, but it was registered by the granter. Some years afterwards, Leckie, by another deed disponed the heritable subject, and all his movables, among his three daughters equally. After the father's death the youngest daughter brought a reduction of the latter settlement, on the ground that the former being put upon record, was thence to be held a delivered deed and was consequently, irrevocable. The Lords found that the first deed, in so far as regarded the movables, could operate no transference of these till the granter's death, and therefore to that extent it was revoked by the posterior settlement; but with regard to the heritage, they found that the registration of the deed was equivalent to delivery, and therefore reduced the latter settlement quoad the heritage.

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(1) 1 Will. & Sh. at p. 101.

(2) 12 Dec. 1839. 2 Court Sess. Cas. 2nd Series, p. 225.

(3) May 18, 1819. 19 Fac. Coll. 730.

(4) Nov. 2, 1776. Mor. 11581.

In *Sommerville* v. *Sommerville* (1) the deed in question was held testamentary and revocable; and was a good authority that actual delivery of a testamentary deed does not make the irrevocability any surer. Of that case Lord Mackenzie, who was counsel for one of the parties, said, " what was chiefly pressed there was, first, that the deed revoked was declared in its preamble a '*settlement*;' and, secondly, that it conveyed all the granter's property '*as at his death*' " (2). In *Spalding* v. *Spalding* (3) all the previous cases are examined; and the Court in holding that a posthumous child was entitled as a creditor to aliment out of the truster's estate, were of opinion that the trust deed there could not be revoked gratuitously, or at the truster's pleasure. As to irrevocability: see also *Tennent* v. *Tennent* (4).

In *Macleod* v. *Cuninghame* (5) the Court held that in the circumstances of the case, the trust disposition and assignation of the property executed by the lady in contemplation of her marriage, was to be considered onerous and obligatory on the granter only in so far as it contained provisions or destinations of heritage in favour of the issue of the marriage, and that quoad ultra it was gratuitous and liable to be revoked on the dissolution of the marriage without issue. There the Lord Justice Clerk observed that the lady had clearly reserved the power that, failing children, the trustees should convey to such persons or person, or to *such uses and purposes* as she might appoint. Who may be included within the consideration of the marriage contract is shewn by *Newstead* v. *Searles* (1). There a widow who had two

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(1) May 18, 1819. 19 Fac. Coll. 730.

(2) 2 Court Sess. Cas. 2nd Series, at p. 231.

(3) 1874. 2 Court Sess. Cas. 4th Series, p. 237; 12 Sc. L. R. at pp. 173, 173.

(4) 1869. 7 Court Sess. Cas. 3rd Series, 936.

(5) 1841. 3 Court Sess. Cas. 2nd Series, pp. 1288, 1306.

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(1) This case is reported in 1 Atkyn's Reports, p. 264, under date the 2nd of March, 1737, and also in West temp. Hardw. (1827 ed.) p. 287.

The plaintiff Newstead is the eldest son and heir of Elizabeth, late the wife of Newstead, sen., who was the eldest daughter and co-heir of Elizabeth Searles, deceased, by John Martyn, her former husband, and the plaintiff, Susannah, is the youngest daughter, and another of the co-heirs of Elizabeth Searles, deceased, by John Martyn, and the plaintiff Elizabeth the wife of Joseph Atkinson, is the daughter of Susannah Stokes, and grandchild of Elizabeth Searles. Mr. Cornwallis seised in fee of freehold and copyhold, and possessed of leasehold, held of the Bishop of Norwich, in Suffolk, of the yearly value of £150, made his will in 1698, having first surrendered his copyhold estate to the use of his will, and thereby gave to Grace, his wife, all his freehold, copyhold, and leasehold, for so long as she should continue his widow, and after her decease, then he gave the freehold, copyhold, and leasehold estates to Elizabeth Searles, then Elizabeth Martyn, his daughter, and her heirs; the testator died soon after. Elizabeth Searles, before her marriage with the defendant Samuel Searles, by indenture, dated the 30th of April, 1709, between her of the first part, Samuel Searles of the second part, Smith and Maltyward of the third part, reciting the will of Mr. Cornwallis, and that a marriage was intended between Elizabeth and Samuel; and that it was agreed that Elizabeth should have the disposition of her estates after the death of Grace; Elizabeth with the consent of Samuel for the settlement of her estate upon such children, and grandchildren, as Elizabeth should have living, either by her late husband, John Martyn, or by Samuel Searles, at the time of her death, did covenant with Smith and Maltyward, that they and their heirs should after the intended marriage, and the death of Grace, stand seised of the messuage held by lease of the Bishop of Norwich, and all other the said estates of John Cornwallis, given by his will to Elizabeth Searles after Grace's decease, to the uses therein and after mentioned, that is to say, when the freehold and copyhold lands should come to be vested in Elizabeth, to permit Samuel Searles to receive to his own use, during the coverture, the rents and profits thereof, and if Elizabeth survived Samuel, then she to receive them during her life, with a power to Elizabeth to charge the said estates by her will, or any other writing, with £200, to be paid after her decease, as she shall appoint, and for want of such appointment, to be paid to Samuel, and after the deaths of Grace and Elizabeth, that the trustees and their heirs should divide the freehold, copyhold, and leasehold estates in manner following (that is to say), if no issue between Samuel and Elizabeth living at her decease, that then they should convey one moiety of the said premises to the use of the plaintiff Newstead, his heirs and assigns; and the other moiety to the use of the plaintiff, Susannah Stokes, her daughter, for life remainder to her granddaughter the plaintiff, Elizabeth Atkinson, her heirs and assigns; provided if there should be any child or children between Samuel and Elizabeth, that then each children by her first husband, and these two children each of them a child, by articles before her second marriage to which her

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such child to have an equal share of the said estate, with the plaintiff Newstead and Elizabeth Atkinson. The marriage took effect, and the defendant Searles entered upon the freehold, copyhold, and leasehold lands, and received the rents thereof, upon the death of Grace, which happened in 1719, and enjoyed the same until the death of Elizabeth, which happened in September, 1733, without leaving any issue by the defendant Searles; the plaintiff on the death of Elizabeth, became entitled to the said moiety under the settlement, and Susannah Stokes to the other for life, with remainder to Elizabeth Atkinson and her heirs, and insist the same ought to be conveyed accordingly, and that the deed of the 30th of April, 1709, ought to be carried into execution; and therefore by their bill pray an account of the rents, &c., received from the freehold, copyhold, and leasehold estates, since the death of Elizabeth Searles, and that one moiety of the residue of the profits may be paid to the plaintiff Newstead, the other to the plaintiff Stokes and Susannah his wife, and that the legal estate of the said freehold, copyhold, and leasehold estates may be granted, surrendered, and conveyed to such of the plaintiffs as are entitled to the same, according to the settlement of the 30th of April, 1709. The defendant Searles, in 1719, together with Elizabeth his wife, mortgaged the freehold estate for a term of years, for £200 to Pindar, and the leasehold estate was afterwards assigned to him, as a further security, and Searles and his wife levied at that time, and afterwards, fines whereby the freehold and leasehold became vested in Searles in fee, after Elizabeth's death, subject to the mortgage. Searles insisted that he was entitled to the equity of redemption, and that his wife executed such deeds and fines out of affection to him, and also that Elizabeth dying without appointment the £200 under the deed of the 30th of April, 1709, he ought to have paid to him. The defendant Millar claims as assignee of Pindar's mortgage term, which, after several mesne assignments became vested in him on the 26th of March, 1733, at which time he advanced a further sum to Searles and his wife, and there is now due to him for principal £1310, besides interest, and says that he never had any notice, till after the death of Elizabeth Searles, of the plaintiff's claim, nor of the indenture of the 30th of April, 1709.

For the plaintiff it was contended (see from Lord Hardwicke's notes in West. temp. Hardw. at p. 290), that as to the mortgagees, there was clear evidence of notice that Pindar, the original mortgagee, took his conveyance from the trustees, and not from the husband and wife; that the plaintiffs were not mere volunteers, for that every reciprocal stipulation, previous to marriage, imports a consideration. In this case the husband would have been tenant by the curtesy of the freehold, and would have had an absolute power to dispose of the leasehold. In *Osgood* v. *Strode* (2 P. Wms. 245) the question was as to a remote relation claiming after a previous estate tail. Here the plaintiffs were the primary objects of the settlement; they were to be preferred, or at least, to take equally with the children of the second marriage. In *Lechmere* v. *Lechmere* (Ca. temp. Talb. 80; 3 P. Wms. 211) the covenants of a marriage settlement were husband was a party and with his consent, conveyed her whole property to trustees, that they should divide her estate if no issue

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enforced for the benefit of an heir-at-law, although he was not one of the immediate objects of its provisions. Contended for Miller, the mortgagee, the plaintiffs were mere volunteers; no consideration moved from them. That it was the same thing as if the agreement had been made upon any other occasion. That the question was not, whether these articles were fraudulent as against purchasers, but whether the Court would assist the plaintiffs, who were mere volunteers, to carry them into execution. That in *Parry* v. *Hughes* (2 Eq. Ca. Abr. 54) the Court refused its aid to one claiming under similar circumstances. In *Osgood* v. *Strode* (2 P. Wms. at p. 254), Lord Macclesfield said that the husband and the wife and the issue were the only parties who could be presumed to be stipulated for in marriage articles, and that in *Vernon* v. *Vernon* (2 P. Wms. 593; 4 Bro. P. C. 26, S. C.) the plaintiffs had a sort of claim which the settlement might have been intended to satisfy. That if the plaintiffs were to be considered as mere volunteers, the question of notice was immaterial, but if not, that no sufficient evidence of notice had been given.

Lord Hardwicke, then Lord Chancellor, in giving judgment, said: "The question is whether the articles of the 30th of April, 1709, are for a valuable consideration and binding, or ought to be considered as voluntary and fraudulent, with respect to subsequent creditors or purchasers? If I was to lay it down as a rule that such articles as these are not binding, it would become impossible for a widow on her second marriage to make any certain provision for the issue of a former, and the second husband might then contrive to defeat the provisions made for those children (vide *Cotton* v. *King*, 2 P. Wms. 358, 674; *Countess of Strathmore* v. *Bowes*, 2 Bro. Cha. Rep. 345; 1 Ves. jun. 22). I am of opinion these articles ought not to be considered as a voluntary agreement, and that the plaintiffs are entitled to relief in this Court. This is the case of a widow, who has two children by a former husband, and no provision made for them, and those two children have each of them a child, and the mother being in possession in her own right of freehold estate, leasehold, and copyhold, the second husband, if there had been a child born alive, would have been entitled to be tenant by the courtesy of the freehold, and also to the leasehold and copyhold immediately upon the marriage. To prevent this, by the articles before the second marriage, £200 is allowed to be raised by the wife out of the estate, and in case there should be no children of the second marriage, then one moiety thereof was to go to the plaintiff Newstead his heirs and assigns, and the other to Susannah Stokes for life, remainder to Elizabeth Atkinson, her heirs and assigns, the former her grandson by the first marriage, and the latter her daughter and granddaughter; but if there should be any child or children of the second marriage, then they were to have an equal share with the plaintiffs. Upon the mortgage to Pindar, by the contrivance of some country attorney, Elizabeth Searles and her husband levied a fine, and in the deed to lead the uses there is a complete recital of the will, under which the wife claimed, and of her marriage settlement in so ample a manner, that the will and settlement must necessarily have been laid before him, and of the marriage, in moieties, one to the plaintiff, her grandson, his heirs and assigns, the other to her granddaughter in fee, provided if there should be any child or children of the marriage, that child or children to have an equal share of the said estates with the grandson and granddaughter. The husband and wife afterwards mortgaged the settled estates. It was held that the settlement was not a voluntary agreement but a binding one.

In *Clayton* v. *Lord Wilton* (1) a man seised in fee of several

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he must consequently have had full notice of it as agent for the mortgagee. The children of the first marriage stand in the very same plight and condition as the issue would have done if there had been any of the second marriage, and even are provided for before them. Supposing there had been issue of the second marriage, and they had brought their bill to carry these articles into execution, upon a decree in their favour, would not the children by the first marriage have been entitled to a benefit from the decree? Taking the case with all its circumstances, I think the settlement no voluntary agreement, but a binding one; the statutes of the 13 and 27 Elizabeth that make conveyances fraudulent, are voluntary conveyances, made against purchasers upon a valuable consideration, or bonâ fide creditors: but it would be difficult to shew that such a limitation, as in the present case, has been held fraudulent and void against subsequent purchasers or creditors (*Walker* v. *Burrows*, 1 Atkins, 93; *Watson* v. *Routledge*, Cowp. 705); *Otley* v. *Manning*, 9 East, 59; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84; *Jenkins* v. *Keymis*, 1 Lev. 150, 237, and note; 1 Atkins, 267; Hardr. 395; Ch. Cas. 103; Ch. Rep. 275; Gilb. fees Pract. 303. There Sir Nicholas Keymis being tenant for life, remainder to his son Charles in tail, in 1641, in consideration of a marriage to be had between his son and Blanch Mansell, and £2500 portion, levied a fine to the use of Sir Nicholas Keymis for life, remainder to Charles and Blanch for their lives, remainder to the heirs of the body of Charles, of Blanch begotten, remainder to the heirs of the body of Charles, with power for Sir Nicholas Keymis to charge the premises with £2000. Sir Nicholas and Charles, in 1642, joined in a lease and release to David Jenkins and his heirs for £2000, on condition of payment of £2000 with interest, some years after, to be void. Blanch afterwards dies without issue. Charles Keymis married another wife, by whom he had issue, the defender, and dies; the mortgagee dies, and his heir brought an ejectment, and adjudged the lease and release was no good execution of the power at common law. He then brought his bill in equity on these grounds: First, that the consideration of the marriage of Blanch, and £2500 paid with her, did not extend to the defendant, being an issue by the second venter, and so the estate in remainder whereby he claimed was voluntary; (two other grounds immaterial to this case) but on the first Lord Keeper Bridgman declared that the consideration of £2500 paid on the first marriage should extend to the issue by the second venter.

(1) 1818. Before Lord Eldon, note in 3 Madd. 302.

estates, in contemplation of his marriage settled the estate to the use of himself for life, remainder to trustees to preserve, remainder to the first and other sons of the marriage, successively in tail male, remainder to the first and other sons of the husband by any after taken wife successively in tail male, remainder to the daughters of the intended marriage as tenants in common in tail. The wife died without issue. The husband before his second marriage by indenture, for a valuable consideration, conveyed certain parts of the settled estate to the use of B. her heirs and assigns for ever absolutely. It was held that the conveyance by the husband to B. was not a valid conveyance against the issue of the husband's second marriage. In *Clarke* v. *Wright* (1) it was decided that a settlement of real estate made by a widow on her illegitimate son in contemplation of her second marriage was not void as against a purchaser for valuable consideration.

[EARL OF SELBORNE, L.C.:—That case seems to go beyond the previous cases under the statutes of Elizabeth (2).]

In that case Lord Blackburn said: "The marriage bargain is like any other mutual agreement in which there was many terms,—the promise by the one party to be bound by all the terms is a consideration for the promise of the other party to be bound by all the terms, so that none of them are without consideration" (3). It has also been held that the performance of a covenant by a widow on her second marriage to convey property for the benefit of her children by a former marriage, if made in pursuance of an agreement between her and her intended husband can be enforced at the suit of those children, and is an exception to the general rule, that the performance of a covenant cannot be enforced by volunteers: *Gale* v. *Gale* (4). There Fry, J., said "my attention has been called to the observations of Lord St. Leonards

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(1) 1861. 6 H. & N. 849, examined in *Gale* v. *Gale*, 6 Ch. D. 150.

(2) In *Johnson* v. *Legard*, July 23, 1822, T. & R. 281, 293, Lord Eldon (Lord Chancellor) expressed the opinion that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary, and could not be supported against a subsequent sale to a bonâ fide purchaser. See also 3 Madd. 283.

(3) 6 H. & N. at p. 863, citing Dart's Vendors and Purchasers, pp. 580, 578, 579, with approval.

(4) 6 Ch. D. 144, at p. 152.

(Vendors & Purchasers, 14th ed. 717), as shewing that he did not consider *Newstead* v. *Searles* (1) an authority; but even if he had more pointedly disapproved of that case, I cannot be bound by those observations after the sanction which has been given to that case by the decision in *Clarke* v. *Wright*" (2).

[Earl of Selborne, L.C.:—Lord St. Leonards made the observation that "*Newstead* v. *Searles* cannot upon the abstract question be set up against the current of authorities;" but he said nothing as to that case not being correct on its own circumstances.]

They submitted that the children had also an independent right as creditors: Fraser's Husband and Wife, 2 ed. 1361, and cited also *Gentles* v. *Aitkens* (3); *Jenkins* v. *Keymis* (4).

The Lord Advocate (*Balfour*, Q.C.), (with him, *Webster*, Q.C.), maintained for the respondents:—At the date of the ante-nuptial contract founded on, Mrs. Gloag was the unlimited owner of the property dealt with. Her children by her previous marriage had no claim of any kind upon it, other than as next of kin in the event of her dying intestate. There are material differences between the law of England and the law of Scotland on the construction of matrimonial deeds. According to the general rule of the law of Scotland in a marriage contract the only interests are causa matrimonii. That law regards a marriage contract as one of an onerous character, so far as it deals with the interests of first the spouses, and secondly the children of the intended marriage, and as to their interests it is irrevocable. But, all other persons, though they may be dealt with in a marriage contract, are strangers in the sense of not being proper objects of the contract, and acquire no right in respect of the parental obligations on which the deed is based. Accordingly, unless there is something exceptional in the deed, which there was not here, destinations in favour of such third persons, being in themselves gratuitous, are presumed to be testamentary and revocable. Erskine

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(1) 1 Atk. 264; West. temp. Hardw. 287.

(2) 6 H. & N. 849.

(3) 4 Court Sess. Cas. 1st Series, 749 (2nd Ed.) 757.

(4) 1664. 1 Ler. 150, 237, and 1 Atk. note, p. 267. See *ante*, p. 323.

Inst. 3, 8, 39. So in *Macleod* v. *Cuninghame* (1), it was held that a trust deed and assignation of her property, executed by a lady in contemplation of her second marriage, was to be considered onerous on the granter only in so far as it contained provisions or destinations of heritage in favour of the issue of the marriage, and that, quoad ultra, it was gratuitous and liable to be revoked on the dissolution of the marriage without issue. There was nothing in the tenor of the deed here, to shew that the gift was intended by Mrs. Gloag to be irrevocable. The object of the ante-nuptial contract was to protect her property against the rights conferred by law upon her husband and his creditors, and to make a provision for the children, if any, of the intended marriage. The evident purpose of introducting the children of the former marriage at all, was to give Mrs. Gloag a power, in the event of children being born of the second marriage, to bring in the children of the first marriage to share her property on her death equally or otherwise with those of the second marriage, not with the object in the event of there being no children of the second marriage, to alter the position in which she then stood, and to make an absolute and irrevocable gift to the children of the first marriage. In *Lang* v. *Brown* (2) by post-nuptial mutual settlement between spouses, the husband conveyed the whole estate then belonging to him, or which should belong to him at his death, to his wife, her heirs and assigns; and the wife conveyed to him the whole estate then belonging to her, or which should belong to her at her death, for his liferent use allenarly, and to her daughter by a previous marriage in fee, each reserving a liferent and power to alter during their joint lives. The husband predeceased the wife without leaving issue. It was held that the destination to the daughter in the settlement was no part of the mutual stipulations of the spouses, and a conveyance by the surviving wife was sustained as valid. Although that was the case of a post-nuptial contract, it was for this purpose similar to an ante-nuptial contract. See also *Mitchell* v. *Mitchell* (3).

Lord Fraser in "Husband and Wife" (2nd ed.) p. 1410, says, treating of ordinary destinations in marriage contracts: "After the failure of heirs male of the first marriage, the heirs male of the second marriage succeed; but *they* are merely heirs *in destinatione* and not *in obligatione;* and so their right may be defeated by gratuitous deeds; and this, too, while heirs in a lower link of the destination, namely, the heirs female of the first marriage, are heirs *in obligatione.* The reason of this is, that as the first wife only contracted for her own issue, therefore *quoad* all the other parties the deed is regarded in no other light than a revocable *mortis causa* settlement: *Miller* v. *Cunningham* (1). For the same reason, if a person who had been already married, without a contract, and had a son by his first marriage, should enter into a second, and by his second marriage contract destine his estate to the son of the first, whom failing to the heirs of the second, the latter are *quodammodo* creditors, whose right is indefeasible by gratuitous deeds; while the son of the first marriage, though the first called, is only heir *in destinatione* whose *spes successionis* may be gratuitously defeated: see *Wilson* v. *Niblie* (2); *Edgar* v. *Johnstone* (3).

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(1) 1841. 3 Court Sess. Cas. 2nd Series, pp. 1288, 1306.

(2) 1877. 5 Court Sess. Cas. 3rd Series, 789.

(3) 1877. 4 Court Sess. Cas. 4th Series, 800.

[EARL OF SELBORNE, L.C.:—Those cases do not support Lord Fraser's opinion. The facts in *Miller* v. *Cunningham* (1) do not raise the question, nor was there a second marriage. And from the judgments in *Wilson* v. *Niblie* (2) it appears to be a case more in favour of the appellant.]

In *Miller* v. *Cunningham* (1) the Lords said if there had been heirs male of a second marriage they would have been *in destinatione* only and liable to be disappointed at their father's discretion. And in *Wilson* v. *Niblie* (2) a provision being granted in a post-nuptial contract of marriage by a party to his wife in liferent after his decease, and to the child or children of the marriage, and to A. N. the only child of his former marriage, in fee, without any express reservation of liferent to himself, it was held that interest ran in favour of the children from his death only, and not from that of his wife who predeceased him. Lord Glenlee treated that case as if the daughter of the first marriage had a claim to a part of her mother's estate under the old law (1), and that she took the marriage contract instead of that right, thus making it an onerous transaction, but see his Lordship's remarks as to a virtual revocation (2). In *Johnston* v. *Edgar* (3), one had provided his estate in his contract of marriage to the heir male of that marriage; which failing to his heirs male of any marriage, which failing,

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(1) 1793. Hume, 527.
(2) 13 January, 1825, 3 Court Sess. Cas. 1st Series, p. 430, (2nd Ed.) 301.
(3) 1736. Mor. 4325.

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(1) See now 18 Vict. c. 23, s. 6; see Skene's Reg. in Majest. p. 55.

(2) *Wilson* v. *Niblie*, 13th Jan. 1825, 3 Ct. Sess. Cas., 1st Series, (2nd Ed.) 301; 21 F. C. 651, was as follows:—James Niblie had a daughter, Anne, by his first marriage. By a post-nuptial contract with Jean Knox, his second wife, he bound himself "To pay to the said Jean Knox, his wife, a free residue of £10 yearly during all the days of her life in case she survived him. And for the said Jean Knox her further security, and more sure payment of the forsaid annuity, the said James Niblie binds and obliges him and his foresaids, to lay out and invest on good heritable or personal security, the sum of £200, and to take the rights thereof to the said Jean Knox in liferent, during all the days of her lifetime after his decease, and to the child or children of the marriage, and to Anne Niblie, the only child of his former marriage, in fee, in such proportions as he shall at any time of his life provide and determine by a writing under his own hand; and failing such appointment, to be divided equally among them." This provision to Anne Niblie, and to the children of the second marriage, was declared to be in full satisfaction of all that they could claim as bairn's parts, legitim, or executry. Jean Knox died in 1795, leaving an only daughter of the marriage, who was alive in 1825. James Niblie died in 1820, without having exercised the reserved powers of fixing the proportion of the provisions between his children, but leaving a general disposition of all his property in favour of his brother Hugh Niblie, the defender. Anne Niblie had predeceased her father; but her only son, the pursuer Wilson, raised an action against Hugh Niblie, concluding for payment of £100 as his mother's share of the above-mentioned provision with interest from the death of Jean Knox, in 1795. Hugh Niblie, the defender, pleaded (see Fac. Coll. p. 652): (1) By the conception of the marriage contract, no jus crediti was created in favour even of the issue of the second marriage, but a bare hope of succession, which not only fell by their predecease, but which it was in their father's power gratuitously to disappoint, supposing their survivance. Before the power of distribution was exercised or until it was extinguished by the father's death, it was impossible there could be a proper right of credit vested in the children to any specific portion of the sum. But supposing the contract onerous with regard to the issue of the second marriage with Jean Knox to the effect of preventing the provision lapsing by their predecease or being revoked by the father's voluntary deed, yet, so far as Anne Niblie was concerned, she not being a child of that marriage, the contract was evidently gratuitous. "No contract can have effect beyond the interest of the contracting parties;" and that of Jean Knox was certainly in construction of law confined to the issue of her own marriage. No higher right, therefore, was conferred by the contract on Anne Niblie, than would have accrued

(3) 1736. Mor. 4325.

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from a bond of provision, which would have lapsed by her predecease, and been held, besides, virtually recalled by the granter's subsequent general settlement in the defender's favour: Erskine, 3, 8, 38, 39, 40; Ibid. 3, 9, 9; *Boston* v. *Horseburgh*, 13 Feb. 1781, 8 F. C. 56; *Moray* v. *Stuart*, 15 Dec. 1782, 9 F. C. 118; *Fleming* v. *Martin*, 6 June, 1798, 12 F. C. 186; *Wallace* v. *Wallace*, 28 Jan. 1807, 13 F. C. 596; *Graham* v. *Hope*, 17 Feb., 1807; Ibid. 607; *Dunlop* v. *Crawford*, 2 June, 1812, 16 F. C. 665. For with regard to the alleged onerosity of the provision in favour of Anne Niblie, in consequence of her right to a share of the goods in communion upon her mother's death, it had no foundation in fact. (2.) But whether Anne Niblie had or had not a vested right, capable of transmission to heirs notwithstanding her predecease, it seems clear at least that the claim for interest from the death of Jean Knox, her stepmother, is untenable. For here, confessedly, the *jus exigendi* did not emerge till an actual division of the *sum upon James* Niblie's death. Besides, the inductive cause and primary object of granting the obligation was to secure an annuity to Jean Knox; so that the beneficial interest of the children in the provision was postponed to her liferent. But as the liferent itself was not to come into operation till the granter's death, it would seem contrary to the plain import of the transaction to hold that, in any event, the granter meant to deprive himself of the use of the money during his life. To this Wilson answered (1), Jean Knox was the sole liferenter; and the children of the two marriages were exclusively the fiars. The fee vested instanter, from the date of the obligation, to Anne Niblie, for her own interest, and in her or the liferentrix for behoof of the children *nascituri*. James Niblie, no doubt, reserved a discretionary power of apportioning the sum; but as a "father cannot exercise this power to the entire exclusion of any one child" Ersk. 3, 8, 49; so the uncertainty or contingent nature of an obligation in point of extent or benefit to accrue from it is not at all inconsistent with the notion of a corresponding *jus crediti*, or a right of fee immediately vesting. The ascertainment of this beneficial interest in legal construction, draws back to the date of the grant or obligation. Whatever might be the result in a question with creditors, and to such question the defender's authorities are alone applicable, there is no doubt that the claim must be held onerous, with reference to the defender, a gratuitous disponee. For besides Anne Niblie's claim of legitim, she was a creditor of her father for her mother's share of the goods in communion, and the provision is declared to be granted in full satisfaction of all claims competent to the granter's children. (2.) If the fee was given to the issue of both marriages burdened only with an eventual liferent in favour of Jean Knox, it seems of necessity to follow, that the discharge of that burden opened to the fiars the full benefit of the fee, or, in other words, the interest accruing from that period became a fund of division amongst them, in like manner as the principal sums. It does not follow from the liferent being declared contingent on the liferentrix surviving the granter, that the latter must be to the heirs female of his present marriage; there being no heirs male of that marriage, the Lords found that the heir male of his second marriage could gratuitously alter the succession in prejudice of the heir female of the first marriage.

The respondents' contention is that until children of the second marriage come into existence, or become impossible, the truster may revoke the deed; and there being here no children of the second marriage Mrs. Gloag could do and has done so. The Scotch law cannot be governed by any cases under the Statutes of Elizabeth. In *Clarke* v. *Wright* (1), Williams, J., thought *Newstead* v. *Searles* (2) no longer binding; and Lord St. Leonards

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presumed to have reserved his own liferent in the event of his survivance. Therefore as soon as by Jean Knox's predecease the right of liferent fell, there was nothing to intercept from the fiars generally the beneficial interest of the fee, although the share of each could not be ascertained till the granter's death.

The Lord Ordinary (Lord Pitmilly) decerned for payment of the principal, with interest from the death of Jean Knox; but the Second Division, on a petition at Hugh Niblie's instance, altered this judgment so far as to find interest due from the death of James Niblie only; Lord Glenlee, observed:—"The question is, what was the intention of the parties. The power reserved to James Niblie is inconsistent with the idea that the provision was to be paid at his wife's death. A father cannot be presumed to part with the fee during his life, unless the provision be very explicit, even in reference to children of the marriage, and still more as to other parties. There was no contract with Anne Niblie at all. The father might have revoked at pleasure, leaving her to seek her legal provision; and the fact of his not having paid the provision at his wife's death is a virtual revocation, pro tanto, even if he could be held to have intended that the provision should be paid during his life. Interest therefore can only be claimed from the death of the father; but the principal is due; for, being a provision to children of two marriages generally, the survivance of issue of one prevents it from lapsing.

Lord Pitmilly agreed that the principal sum was clearly due, but disagreed as to when interest should commence to run. Lord Robertson concurred with Lord Glenlee, that the children had no *jus exigendi* during the father's life, and that interest could only run from the period of his death. The Lord Justice Clerk (Boyle) observed: "There can be no doubt as to the claim for the principal sum being good; but interest is due from the death of the father only. It is true, there are no words expressly reserving the liferent to the father; but, on the other hand, the liferent to Jean Knox is to commence only after his death. This, and the reserved powers, imply a reservation of the liferent by the father, and that the provision was not to be payable until his death."

(1) 1861. 6 H. & N. 849, at p. 880, examined in *Gale* v. *Gale*, 6 Ch. D. 150.

(2) 1 Atk. 264; West, Ch. C. 287.

threw doubt upon it (1); see also *Price* v. *Jenkins* (2). As to *Clayton* v. *Lord Wilton* (3), Lord St. Leonards said in Vendors and Purchasers (13th ed.), p. 589 (14th ed.), p. 716: "The marriage consideration runs through the whole settlement as far as it relates to the husband, and wife, and issue: *Nairn* v. *Prowse* (4); *Jason* v. *Jervis* (5); see *Barham* v. *Lord Clarendon* (6); *but* the marriage consideration will not extend to remainders to collateral relations, so as to support them against a subsequent sale to a bonâ fide purchaser: *Johnson* v. *Legard* (7); although the remainders may, of course, be contracted for, and so brought within the consideration: *Ford* v. *Steuart* (8); and they appear to have been supported, where after a *vested* estate tail: *White* v. *Stringer* (9). And they are valid where they are interposed between two limitations to the different classes of issue of the marriage, for that construction is necessary to support the ultimate remainder to the issue of the marriage: *Clayton* v. *Lord Wilton* (10)." That may be perfectly correct, but it does not apply here. Delivery and infeftment do not vary the quality of the gift, for where, as here, a trust conveyance embraces different interests, some of which are onerous and others purely gratuitous and testamentary, the precautions taken to secure the onerous obligations by delivery of the deed, and giving infeftment to trustees will be attributable to the onerous obligations and will not be held to transmute the gratuitous and testamentary provision of the deed into irrevocable gifts or bequests. See Lord Gifford in *Costine* v. *Costine* (11) to the effect that until the real character of the right intended to be given is determined, delivery will not alter its nature: and the delivery of a marriage contract is one of the cases his Lordship gives as an example. Therefore, if it was intended to confer a revocable right on the children of the first marriage delivery will not make it irrevocable.

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(1) Vendors & Purchasers, 14th ed. at p. 717.

(2) 4 Ch. D. 483.

(3) 3 Madd. 302.

(4) 6 Vesey, 752; Lane, 22; 2 Ro. R. 306.

(5) 1 Ver. 286.

(6) 10 Hare, 126.

(7) T. & R. 281.

(8) 15 Beav. 493.

(9) 2 Lev. 105; 2 Peere Will. 255.

(10) 3 Madd. 302.

(11) 5 Court Sess. Cas. 4th Series, 782, at p. 793; 15 Scot. Law Rep. at p. 453.

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Smitton v. *Tod* (1), *Turnbulls* v. *Tawes* (2), and *Tennent* v. *Tennent* (3) are cases where effect of delivery was to give a gift out and out. But the deed here bears to be a marriage contract; and it contains no pactorial contract to do anything except for the marriage. According to the general rule of marriage settlements, there is a burden upon the radical right, as long as children of that marriage can come into existence and when they have come into existence they cannot be deprived of it, but until that event occurs the radical right remains in the truster. No doubt there is no legal impossibility in creating a vested interest in the children of a prior marriage, which would be irrevocable and irredeemable; but there should be no levying up of such children without a clear indication of intention. The case which has occurred here is that Mrs. Gloag had never been divested of her radical right, inasmuch as the contingency of children by the second marriage had not occurred, and therefore she could dispose of her property as she pleased. [They also cited *Wollaston* v. *Tribe* (4).]

Shiress Will, Q.C., was not called upon in reply.

EARL OF SELBORNE, L.C.:—

This is a case which depends entirely upon the proper construction of a marriage settlement dated the 12th of December, 1855. It is not in dispute that it was in the power of the lady to whom this property belonged, and who, beyond all doubt, conveyed it in trust by that marriage settlement, to make a good title by gift to living persons, whether those persons were within the consideration of marriage strictly speaking or not; provided that she intended it to be an irrevocable gift, and took the proper means for giving effect to it. Nor do I understand it to be at all in dispute that such a conveyance by such a trust as this to trustees, upon trusts declared, might have been effectual for the purpose of immediately vesting the property in the persons indicated by the words declaring the trusts in an irrevocable manner, provided that an intention to do so could properly be collected upon the true construction of the terms of the instrument.

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(1) 1839. 2 Court Sess. Cas. 2nd Series, 225.

(2) 1825 (Rev. H. L.), 1 Will. & Sh. 80.

(3) 1869. 7 Court Sess. Cas. 3rd Series, 936.

(4) Law Rep. 9 Eq. 44.

Now the propositions, as I understand them, upon which the judgments in the Court below depend, are in substance these: that according to the true construction of this instrument, having regard to the manner in which the consideration of marriage is viewed by the law of Scotland, there is, as it was put by the Lord Advocate, a gift of one kind, and with one class of legal incidents, to the future children of the then intended marriage, giving them a jus crediti, and a gift of another kind, with another class of legal incidents, to the children already born of the lady, which is revocable and testamentary. Of course, if there had been words drawing that line between the two classes of children, or if the nature of the interests given to them had been such that, being ascertained by construction, the law of Scotland would have regarded them in those two different lights, in that case the judgment given in the Court below might have prevailed. But, as it appears to me, our first duty is to construe this instrument; and no authority has been cited, nor, in the absence of authority, can I conceive of any reason in principle why, because the instrument is a marriage settlement, it should not take effect according to the intention to be collected from its terms, upon those principles of construction which ought properly to be applied to those terms as they stand in the deed. As far as the form of the conveyance to the trustees is concerned, there is nothing wanting which is requisite to make a complete and a perfect title immediately effectual for the purposes of the trust. There are no words indicating an intention that any part of it should be revocable, either on the footing of power, or on the footing on which all testamentary instruments are revocable—there is nothing to shew that this was intended to be testamentary; and I cannot help pausing to observe that the argument on the other side really requires that it should be regarded as testamentary, and not as a reserved faculty or power independent of property.

The form being admitted to be sufficient for the creation of present vested interests, if according to its true construction the instrument has that effect, we must look at the words and see what they mean. There is first of all a declaration that "the subjects are to be held by the trustees in trust for the ends, uses, and purposes following." The first purpose is "for behoof of" the lady "in life-rent for her life-rent alimentary use of the annual proceeds thereof allenarly." That is perfectly intelligible, and disposes of the whole usufruct and beneficial interest during her life. Then there is a renunciation of the jus mariti, which I assume, with the majority of the judges in the Court below, to be a complete renunciation as to the corpus of the trust estate, and not as to the income during the wife's life only. Therefore, we have the whole period of the wife's life provided for by giving her a life interest inalienable for herself alone, and no more than a life interest; and, though I do not at all mean to say that if the true result in point of construction or of law had afterwards been to shew that she was to have more than a life estate, the use of the word "allenarly" would have prevented the deed from operating accordingly, yet, on the other hand, as far as intention is concerned, I conceive this to be an indication that she was meant to have not the fee but a life estate, and that life estate as a burden upon the fee. Then it goes on, "and for behoof of the children procreated, or to be procreated, of the body of the said Mrs. Helen Campbell or Mackie, in such proportions and on such terms and conditions as the said Mrs. Helen Campbell or Mackie may appoint by a writing under her hand, which failing, equally among them share and share alike, and their respective heirs and executors whomsoever in fee," words completely and absolutely sufficient to carry the fee to the class of children there described, of whom two were then in life, namely, those who were already born of the previous marriage.

We are now dealing with the question of intention as discoverable from the words of the deed; and to me it is as plain as anything in the world can be, that the intention was to make of all those children a single class, the members of which class were to take equally among them, share and share alike, subject to a power of apportionment which, if exercised in good faith, might be exercised so as to give to any of them, whether children of a former marriage or of the present marriage, such shares as the mother might think fit. To my mind, anything more absolutely inconsistent with the intention discoverable from those words than the suggestion that some of them were to take vested interests, as they came into existence, in the nature of a jus crediti, and that others were to take nothing, except subject to a testamentary power in the wife, is inconceivable. How could they possibly take modo et formâ, as those words direct, without taking equally among them share and share alike? Can any intention be made clearer by words than that here expressed that they should form a single class, and, for the purpose of the succession to their mother in this property, stand pari passu equally inter se, except so far as she, not in favour of anybody else, but in favour of some of the members of that class, might think fit to create inequality? Therefore, if it is to be regarded as a question of intention discoverable from the words of the deed, I cannot see how there is room for any serious doubt or question: and it being admitted that the conveyancing operation is sufficient to vest the fee, subject to the mother's life-rent, two of the members of that class having been in existence at the time when the thing was done; and it being also admitted that it could be legally done; I am unable to understand on what grounds it should be held not to have been so done.

But the argument seems to be this—that it is a marriage contract; and that when you are dealing with a marriage contract the law recognises the consideration of marriage as extending only to the spouses and to the children or issue to be procreated of that marriage, and that all the provisions for any other persons, whether children of either of them by any other marriage or not, are outside the marriage consideration. But how does that proposition tend to alter the construction of the contract? Is there any law which says that because it is a marriage contract, and because the previously born children are outside the matrimonial consideration as such, therefore a deed conceived in apt and proper terms and form, with a plain intention that they should take pari passu inter se, is not to prevail? No principle has been stated for that, no positive rule of the law of Scotland, and no authority.

The cases which were cited by Lord Fraser (1) I will not comment upon at length, but they seem to me to furnish not a vestige of authority for such a construction of these words. In the only one of those cases in which the words were at all similar, namely, *Wilson* v. *Niblie* (2), (and singularly enough Lord Fraser treats them as if they were not similar), the decision was in favour of the child of an earlier marriage, and not against that child. Nor is there anything in the dicta of any of the learned judges which seems to me to shew that the idea prevailed with them that upon such a marriage contract, if the intention was to put the children of two classes on an equality and to make them into one class, that intention should not prevail. Of course, my Lords, if there were a rule of law to that effect, the proposition advanced by the Lord Advocate, that there should be no levelling up without a clear indication of intention, might possibly be true; but I can only say that if that proposition is to be regarded as applicable here at all, I do find that clear indication of intention. What possible indication of intention to level up can be clearer than that which in express terms puts the members of the class who might otherwise be postponed upon a footing of absolute equality with those who otherwise would be the preferred members of that class?

I do not think that I need make any further observation upon the case beyond this, that if any English authorities were fit to be regarded in a question of this kind as to what is and what is not within the considerations of the contract, the cases of *Newstead* v. *Searles* (3), and *Clayton* v. *Lord Wilton* (4) would be very much to the purpose. *Newstead* v. *Searles* (3) was a case of this kind—there was a marriage contract, and there was a gift in remainder to the existing children of a former marriage, subject to letting in those who might afterwards be born of the intended marriage; and when they came into existence the state of things would be such as we have here. Upon those circumstances Lord Hardwicke, a very great judge, entertained no doubt that the considerations of the contract included the earlier children, because their interests and those of the children of the marriage which afterwards took place were so dealt with, that the stipulations for those children who were within the marriage consideration were made dependent upon the agreement that the others should take as they did. The children within the consideration were to take upon certain terms; and without giving them either more or less than that which the contract gave them, it was impossible to disappoint the others. Exactly the same was the principle of the case of *Clayton* v. *Lord Wilton* (1), though the form in which the question was raised was different, because it was a limitation by way of remainder occurring after a gift to male issue who were within the consideration of marriage, and before another gift to female issue in the like situation.

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(1) *Miller* v. *Cunningham*, 1793, Hume, 527; *Wilson* v. *Niblie*, Jan. 13, 1825, 3 Court Sess. Cas. 1st Series, 430 (2nd Ed.) 301; *Edgar* v. *Johnston*, 1736, M. 4325.

(2) 13 Jan. 1825, 3 Court Sess. Cas. 1st Series, 430 (2nd ed.), p. 301.

(3) 1737, 1 Atk. 264.

(4) 1818, 3 Madd. 302.

I should hesitate very much to rely upon English authority in any case in which there was really Scotch authority to the contrary, even when the matter decided in the English cases was upon a point which in reason ought to be common to the jurisprudence of all countries. The considerations of the contract, though founded on marriage, must, I apprehend, extend to all those terms of the contract on which depend the interests of the persons who are within the consideration of marriage; and when they take only on terms which admit to a participation with them others who would not otherwise be within the consideration, then, not the matrimonial consideration properly so called, but the considerations of the mutual contract extend to and comprehend them.

The only other point which I need notice at all is this, that it was suggested in the argument, and it seems to have been thought by some of the learned judges in the Court below, that whatever might have been the proper view of the case if there had been children born of the then intended marriage, the second marriage, yet, that it is different when there are none. Now I apprehend that upon the construction of this deed, its effect and operation must be determined at the time when it was executed, and not according to the course of subsequent events. If, indeed, it had been expressed thus, (as I put it in argument to the Lord Advocate,) "after the life interest of the wife, subject thereto, to the wife in fee, provided that if any child shall be born of the marriage, then the same shall be for the children of both marriages," the children of both marriages could only have taken if that event had happened. When that event did happen, then, I take it, the position of things would be very much the same as it is now; but, if that had been the case, the children of the first marriage would have taken nothing if no child had been born of the second marriage, and of course the mother would have had the property in the meantime. But those are not the words of this deed; and without the greatest violence to all principles of construction, your Lordships cannot, I think, interpolate any such words into the deed. Taking the deed as it stands, there were living persons, children of the first marriage, who were to be members of the class which was to comprehend children of the second marriage if born, and who were capable of taking, and in my opinion did take, a beneficial interest in the fee. There is nothing testamentary—there is nothing to make the instrument revocable; and consequently I must move your Lordships that the appeal be allowed, and that the interlocutors appealed from be reversed.

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(1) 1818, 3 Madd. 302.

LORD WATSON:—

I cannot agree, in this case, with the result at which the Lord Ordinary and the majority of the learned judges of the Second Division have arrived; but at the same time I am not inclined to find fault with the exposition which they have given of the general principles of law applicable to the construction of clauses of destination occurring in a marriage contract. On the contrary, I think that the error into which they have fallen arises from their having brought within the scope of these principles a case which is not ruled by them.

The general rule of law is very clearly laid down by Mr. Erskine in his Institutes (1), where, speaking of the right of the husband, he says, "The father lies under no degree of restraint in favour of the substitutes who are called by the marriage contract after the issue of the marriage, and who acquire no right by such substitution"; and the learned author then goes on to explain the considerations upon which that rule rests: "For," he says, "no contract can have effect beyond the interest of the parties contracting; and the wife and her relations, who are the only contractors with the husband, are not interested in the succession except in so far as it is provided to the wife's issue."

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(1) Book III. tit. 8, par. 39.

At the time when Mr. Erskine wrote, the introduction of the machinery of a trust into a marriage contract was scarcely known; and his observations plainly refer to the usual form in which marriage settlements of land were made in those days, destining the settled estate to the institute, the heir of the marriage, and, failing that heir, to substitutes who were not within the family. But it was found in course of time that certain inconveniences resulted from that form of settlement, because it left the parents fiars, and so exposed the fee which was destined to the children of the marriage to eviction at the instance of creditors and onerous assignees. Accordingly the machinery of a trust was subsequently introduced, which divested the parents of the fee, and had the twofold effect of protecting the estate of the fiars absolutely, and also of enabling the spouses to attain what they had had some difficulty in effecting before, namely, giving the wife an alimentary provision out of the estate which truly belonged to herself, and excluding from that the diligence of her own as well as her husband's creditors.

After the device of a trust had been generally adopted, the Courts still continued to construe clauses of destination occurring in a trust deed in the same manner as they had previously construed these clauses in a simple conveyance. Although the trust existed they held that it had been constituted solely for the purpose of protecting in the meanwhile the interests of the wife and of the children of the marriage; and they accordingly held that provisions made by the wife in favour of strangers, which in an ordinary clause of destination, in a marriage contract, would be construed as testamentary, ought not to be interpreted in any other sense when they occur in a disposition of trust constituted for the purpose of a marriage contract.

So far I agree with the argument addressed to your Lordships

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for the respondents: but it appears to me that the rule of construction has been extended by the Court quite beyond the scope of the doctrine of Mr. Erskine. These children of the prior marriage in the present case are not, in any sense of the word, substitutes—it is a most inaccurate expression to apply to them. They are institutes, not conditional institutes, taking upon the failure of the children of the marriage, but proper institutes taking along with the children of the marriage, at the same time, and to a great extent (for that must be conceded) on the same conditions. No doubt an attempt was made to shew, by the authority of a very useful text-book (1), that the doctrine of Mr. Erskine ought to be more widely extended; and the Lord Advocate cited three decisions (which are to be found in a note to that work) in order to establish the proposition that the principle laid down by Mr. Erskine is expressed in too limited terms, and that when a provision is given directly not only to the children of the marriage in contemplation, but also to the children of a former marriage, the provision in favour of the one must be regarded as onerous and irrevocable, and the provision in favour of the other as revocable and testamentary. Now I venture to think that none of these cases give the least countenance to that proposition. In *Miller* v. *Cunningham* (2) the only question was, whether the heirs female of a marriage, the father having no other issue, took a jus crediti under a marriage settlement in which the destination was to him, and "the heirs to be procreate of the said intended marriage." In *Edgar* v. *Johnston* (3), it was decided that a simple destination in a marriage contract, when launched, must have the ordinary legal effects of such a destination; and, consequently, that a substitute taking under it is fiar, and may alter the succession. The case of *Wilson* v. *Niblie* (4), so far as it decides anything, is an authority unfavourable to the respondents.

The case not being within the rule, the House has in my apprehension to deal with this as an ordinary question as to the intention of the maker of this deed. I am assuming in favour of the respondents that the lady settled this property at her own hand, and without any bargain or paction with her husband; and viewing the destination or disposition in that light, it does not appear to me to be at all doubtful that what she intended to confer upon the children of her first marriage was an estate and interest absolutely identical with that which was being pactionally secured to the issue of the marriage into which she was entering.

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(1) Fraser on Husband and Wife, 2nd ed. p. 1410.

(2) 1793, Hume, 527.

(3) 1736, Mor. 4325.

(4) 13 Jan. 1825, 3 Court Sess. Cas. 1st Series, 430 (2nd ed.), p. 301.

I concur in the observations which have been made by the noble and learned Lord on the woolsack as to the point of time to which we must look in construing a clause like this. It is impossible to read it in the light of the events which have occurred. That would lead to very strange results, for in that case the same clause inserted in deeds of marriage settlement for the same purposes would be differently read upon every occasion, according to what might chance to be the condition of the two families upon whom the settlement was made. Therefore we must look at it as at the date of the marriage, as at the time when there was a possibility of issue of that second marriage; and, so regarding it, I do not doubt that it was the intention of the wife to give her children of the first marriage an estate equal in all respects to that which she was conferring upon the children of the second marriage with the assent of her husband. The power of apportionment attached to the gift to the two families appears to me, if it were necessary, to make that intention still more clear.

If the case fell within the doctrine of Erskine, and the principle laid down by the majority of the learned Judges in the Court below, it would follow that the wife remained as much the fiar of what she had given to her second family as if it had been property of her own, in regard to which she had executed a settlement which she could revoke at any time. Accordingly this lady remained the undoubted proprietor of the shares which she had given by testamentary bequest to the children of her first marriage, if the doctrine of Erskine applies. But can it be held to be consistent with the intention of the parties to this deed that the wife was to come in herself under the power of appointment which she reserved, or that an assignee of hers was to come in under that power of appointment, instead of the children of her first marriage, or that her creditors were to have the right of coming in and carrying off the provision which she had made for those children. The reservation of such a power appears to me to be utterly inconsistent with her retention of a right of fee; and indeed the able and ingenious argument of the Lord Advocate was put in a way which seemed to betray his consciousness of the difficulty which that apportionment clause presented, because he argued that the only power given to the lady was to take away from one of the families to whom she had given her estate, and to bestow their share upon the other family.

All these considerations satisfy me that the intention of the wife was to give to the children of the first marriage an absolute and indefeasible interest; and that being so she might, before the deed was issued, and as long as it was under her own control, have destroyed it, or have put an end to that right. But it is impossible, after what has taken place, and particularly after what took place immediately on marriage by the constitution of the trust, that she could recall it. Accordingly I agree with your Lordship that the whole of the interlocutors under appeal, beginning with that of the Lord Ordinary of the 19th of July, 1882, ought to be reversed, and that the cause should be remitted to the Court below for further procedure, because I am very sorry to see that the judgment of the House will not dispose finally of the litigation between these parties.

LORD FITZGERALD:—

As I concur in the judgments just delivered, and in the reasons expressed for them, I ask leave only to add a word.

My Lords, on reading the printed case I had come to the conclusion that if this case was to be determined according to the principles of English law there could be no doubt as to the true construction of the settlement, and that according to English authority the provision for the children of the first marriage came within the consideration. On this point it may not be unimportant to observe that the intended husband gives his consent to the whole settlement, and becomes an executing party.

It was, however, said that, according to the law of Scotland expounded by Scotch authorities, your Lordships were prohibited from considering the gift to the children of the first marriage otherwise than as gratuitous and revocable at the will of the settler. If there had been any inexorable rule of law supported by authority and acquiescence, it would be your Lordships' duty to give effect to it even if you considered it to be unreasonable, but the learned Lord Advocate in his full and able and exhaustive consideration of the Scotch cases, has failed to satisfy your Lordships that there is any one of them directly in point, or that there is any rule of the law of Scotland which compels your Lordships to treat the dispositions in question as gratuitous and revocable.

We are, therefore, at liberty to look to the settlement itself to ascertain the intention of the settler, and the true and just interpretation of the instrument according to that intention. In doing so we must look to the state of circumstances then existing or possible, and not to the facts as they did afterwards and actually emerge.

The possible event contemplated at the time of the settlement was that there might be issue of the second marriage.

Mrs. Mackie then, having full dominion over the property she is putting in settlement, and with the consent of her intended husband who gives up his whole jus mariti, disposes of that property subject to her life-rent alimentary for behoof of the children procreated, or to be procreated, of her body, in such proportions and on such terms and conditions as she may appoint by a writing under her hand, which failing, equally among them share and share alike, and their respective heirs and executors whomsoever in fee. The rights of the two classes of children are here so interwoven that it is not practicable to separate them. They are equally the first institutes under the settlement.

I concur in conclusion with Lord Rutherfurd Clark on the true construction of the settlement, and I entertain no doubt that the settler intended to do that which she was competent to do, that is to place the rights of the two classes of children on the same common foundation by one irrevocable disposition taking effect immediately, and by which the two classes are placed as institutes in the same identical position, and with the same rights. She had adequately expressed that intention, and there is no rule of law to prevent that intention taking effect.

EARL OF SELBORNE, L.C. :—

The form in which I propose to put the question to the House will, as to costs, follow a recent precedent in this House, in the case of *M'Kenzie* v. *British Linen Company* (1).

Ordered and adjudged :—*That so much of the said interlocutors of the Lord Ordinary in Scotland, of the* 19*th of July*, 1882, *and the* 17*th of May*, 1883, *as is complained of in the said appeal, be, and the same is, hereby reversed, and also that the whole of the said interlocutor of the Lords of Session in Scotland, of the Second Division, of the* 9*th of March*, 1883, *complained of in the said appeal, be, and the same is, hereby reversed : And it is declared, That the second plea in law for the defenders ought to be repelled : And it is ordered, That the respondents do pay or cause to be paid to the said appellant the costs of and following upon the reclaiming note in the Court below, the costs prior to the reclaiming note to be dealt with by the Court below as costs in the cause : And it is further ordered, that the respondents do pay or cause to be paid to the said appellant such costs in this House as have been incurred by the appellant in appearing in formâ pauperis, the amount of such last-mentioned costs to be certified by the clerk of the parliaments : And it is further ordered, that unless the costs, certified as aforesaid, shall be paid, &c.*

Agent for appellant : *A. Beveridge*, for *William Officer*, S.S.C.
Agents for respondents : *Martin & Leslie*, for *J. & J. Ross*, W.S.

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(1) Feb. 11, 1881, 6 App. Cas. at p. 113.

[HOUSE OF LORDS.]

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1884
March 17.

BIRRELL AND OTHERS . . . . APPELLANTS;

AND

DRYER AND OTHERS . . . . RESPONDENTS.

Marine Insurance—Time Policy—Negative Words—Where no General Custom of Merchants what Facts to be considered—Maxim contra proferentem.

A time policy of marine insurance on A.'s ship, from the 29th of May, 1878, to the 28th of May, 1879, contained the words "warranted no St. Lawrence between the 1st of October and the 1st of April." The vessel was lost on the voyage home. The underwriters refused A's claim for a total loss on the ground of breach of warranty, inasmuch as the vessel had navigated in the Gulf of St. Lawrence during the prescribed period. A. contended that the above words referred exclusively to the River St. Lawrence. Admittedly no general custom of merchants could be proved: but the facts established that the great river which discharges the waters of the North American lakes, and the gulf into which it flows, both bear the name of "St. Lawrence"; that the navigation of both, though of the gulf in a less degree than of the river, was within the prohibited period dangerous:—

Held, reversing the decision of the Court below, that the evidence disclosed no ambiguity or uncertainty sufficient to prevent the application of the ordinary rules of construction; and according to those rules the whole St. Lawrence navigation, both gulf and river, was within the fair and natural meaning of these negative words, and therefore prohibited during the months in question.

APPEAL from the Second Division of the Court of Session, Scotland (1). The facts are sufficiently set out in the Law Peers' opinions.

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(1) 10 Court Sess. Cas. 4th Series, 585. The Lord Ordinary (Lord M'Laren) and Lord Craighill were both of opinion that the warranty prohibited both the river and the gulf. The Lord Justice Clerk (Moncreiff, and Lord Young were of opinion that the warranty was ambiguous: that no general or local usage of trade had been shewn to exist by which the warranty was to be construed: that a penal clause was to be construed strictly contra proferentes; and consequently that the underwriters were not freed from liability by reason of the vessel having been in the gulf during the excepted period. Lord Rutherfurd Clark, with doubts, agreed with the Lord Justice Clerk and Lord Young.

Feb. 25, 26. *Sir F. Herschell*, S.G., and *Cohen*, Q.C. (with them *F. W. Hollams*), for the appellants.

The *Lord Advocate* (*Balfour*, Q.C.) and *J. G. Barnes*, for the respondents.

The House took time for consideration.

March 17. Earl of Selborne, L.C.:—

The question on this appeal is, whether the words "warranted no St. Lawrence between the 1st of October and the 1st of April," in a time policy, on the respondent's ship, "*L. de V. Chipman*," effected with underwriters at Glasgow on the 8th of June, 1878, (for the twelve months from the 29th of May, 1878, to the 28th of May, 1879), include the Gulf of St. Lawrence, or are confined to the river of that name?

Many witnesses were examined on both sides to shew in what sense they understood these words, and thought that others ought to understand them; but none of those witnesses proved that they bore either the one sense or the other, according to any local or general usage; nor were they able to refer to any instances in which the question had practically arisen, and had been practically determined. Conflicting opinions of individuals, as to the proper interpretation of words in a written contract, would be entitled to no weight, even if it were clear that they were admissible.

Your Lordships have therefore to consider whether the ordinary rules and principles of construction do, or do not, enable you to ascertain the subject to which these words apply, having regard to those extrinsic facts which are either within your judicial cognizance, or sufficiently established by the evidence.

The facts of which, I think, your Lordships are entitled to take judicial notice, independently of evidence, are these. The great river, which discharges the waters of the North American lakes, and the gulf into which it flows, both bear the name of St. Lawrence. There is a "Cape St. Lawrence" at the main southern entrance into the gulf. The river below Quebec expands into a broad estuary, passing, on each side of the island of Anticosti, into the gulf. The river and the gulf are thus naturally and immediately connected with each other; the access to, and the outlet from, the river being through the gulf, which is a large water space, land locked between the west coast of Newfoundland and the southern, eastern, and northern shores of Canada, New Brunswick, and Nova Scotia, having within it the considerable islands of Anticosti, Prince Edward's Island, and Cape Breton, and connected with the Atlantic Ocean by several channels, of which all but one are narrow. If the words "St. Lawrence" were preceded by the definite article, a noun substantive in the singular number must be understood, which (I think) could only be the river; and it would not, in my opinion, be consistent either with the popular or with the geographical use of the word "estuary" (which means the tidal part of a river), to regard the whole waters of the gulf as forming part of the estuary, properly so called, of the River St. Lawrence. Here, however, the words are not "the St. Lawrence;" they are negative, "no St. Lawrence."

The other material facts (established by the evidence) are these. The navigation of the River St. Lawrence is open, and generally safe, from about the beginning of April till October, after which it becomes dangerous, chiefly from its liability to be impeded by frost, which often sets in suddenly and rapidly. After the middle of November vessels cannot remain there, except at the risk of being frozen in for the winter; and, from the beginning of December till about April, the river navigation is (in ordinary seasons) entirely closed. At the end of March, or the beginning of April, the ice breaks up, and descends into the gulf.

The navigation of the gulf is never absolutely closed, but the harbours and narrow waters around its shores, on the south side as well as elsewhere, are often blocked up, or much impeded, in the winter, by ice. Ships with grain and other cargos continue to sail from the Bay of Chaleur, from Miramichi, and from Prince Edward's Island, for some time after the river is closed, and sealing vessels visit the gulf during the winter. "As a general rule" (according to the book called "the St. Lawrence Pilot," quoted by the appellants' witness Lees), "the navigation is not considered safe, even in the southern part of the gulf, after the

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first week in December, or before the 15th of April." From about January (according to the evidence of Mr. Robert Grieve, one of the Respondents' Glasgow witnesses), the gulf is "practically closed;" by which I understand, closed to vessels of any considerable burden, engaged in the ordinary trade of those parts. During this winter season the gulf is dangerous (though most of the witnesses consider its dangers to be less than those of the river), chiefly from fogs and from snowstorms, which are very dense and frequent. These dangers are enhanced to ships engaged in the usual trade of that region, by the nature of their cargoes, lumber, and more especially grain; and, though the same kind of weather is also met with, in the same season, outside upon the banks of Newfoundland, the danger in the gulf is greater, because there is less sea-room there. Besides this, the Anticosti lights are all put out in the middle of December, and, as the winter advances, the Belle Isle light, and all others of any consequence in the gulf, except some small local lights and that of St. Paul's (twelve or thirteen miles from Cape North) are also extinguished.

As to the risks of this navigation, from an insurer's point of view, there is a general consent among the witnesses on both sides. I will refer only to what is said by some of the respondents' witnesses.

Mr. W. R. Grieve (one of those from Newfoundland) said that it was the invariable practice to pay extra premiums for vessels going to the Gulf of St. Lawrence from the 1st of October to the 1st of April; that "both localities" (i.e., the river and the gulf) were "objectionable," but one more than the other; that the percentage of vessels lost in the gulf was very high; and that, during the proscribed period, it was "shunned by underwriters."

Mr. Cooper (a London insurance broker and underwriter) considered the dangers in the river and the gulf "which the warranty was required to guard against," to be "about the same," both being "especially dangerous in the winter;" in his opinion equally dangerous.

Mr. Dale (a Liverpool underwriter) said:—"Both navigations in the winter are dangerous, but one, I think, is more dangerous than the other. The Gulf of St. Lawrence is not an ordinary risk; we get a very enhanced premium for it." He himself would decline to insure for a voyage in the winter to the gulf. "In time policies" (he said), "it is a common practice to exclude both the gulf and the river."

Mr. Robert Grieve (shipowner, of Glasgow) said:—"The reasons for excluding ships from the River St. Lawrence during certain months apply to the gulf, though in a lesser degree. I cannot speak positively as to the practice, but I should think no premium would be taken for a vessel to go into the gulf after a certain time of the year. It is impossible then to get into the river."

Mr. McIntyre (insurance broker, of Glasgow), who negotiated the policy now in question for the respondents, said:—"I suppose there is no doubt that the Gulf of St. Lawrence is an extra dangerous risk in the winter season."

No evidence was given to shew that any such insurance as that now in question could have been effected on similar terms (10 guineas per cent. premium) by a policy so expressed as unequivocally to leave the gulf open to the vessel insured during the prohibited months; and it is significant (though, for the present purpose, not properly evidence), that two of the respondents' Newfoundland witnesses, who had been in the habit of insuring in Glasgow (Mr. W. R. Grieve and Mr. Woods), by policies in the form now in question (which they say they interpret as prohibiting the river navigation only), have themselves, since the meaning of the warranty was brought into controversy by the present action, been obliged to have their policies made out in an altered form, expressly excluding the gulf.

Reading this contract of insurance in the light of the relevant facts, it appears to me that there are two subjects, distinguishable from but closely connected with each other, to both which the descriptive words "St. Lawrence" may apply, and that there is nothing to confine them to one rather than the other of those subjects. The office of the negative form of expression "no St. Lawrence," is not to define, but is to prohibit or exclude. It occurs in a contract for the purposes and objects of which it is reasonable and probable that both the gulf and the river

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should have been meant to be excluded. The reasons for such exclusion during the prohibited months are applicable to both, though in different degrees at different times during that period.

I agree, under these circumstances, with the opinion and the conclusion of the Lord Ordinary. I do not think that the evidence discloses any ambiguity or uncertainty, sufficient to prevent the application to this case of the ordinary rules and principles of construction; and, according to those rules and principles, the whole St. Lawrence navigation, both of gulf and of river, is, in my judgment, within the fair and natural meaning of these negative words, and is therefore prohibited during the months in question. There does not appear to me to be any necessity for resorting to presumptions in favour of or against either party, whether founded on the rule fortius contra proferentem, or on the onus of proving an exception from the general affirmative terms of this contract.

It must be a satisfaction to your Lordships, if this should be your conclusion, that you are in agreement, not indeed with the majority of the Court of Session, but with two out of the five learned judges who had to consider the question in that Court; while the opinion of another of those judges, who concurred with the majority of the Second Division, was not formed without considerable doubt and hesitation. I therefore move your Lordships to reverse the interlocutor appealed from, and to restore that of the Lord Ordinary, with costs.

LORD BLACKBURN:—

I also think that the judgment of the Lord Ordinary was right. The contract is in a time policy for a year, on which is indorsed as part of the contract "Warranted no St. Lawrence between the 1st of October, and the 1st of April." No one can, I think, doubt that the document would, like every policy of marine insurance, be very difficult to construe if it was now for the first time brought before a Court, but there is no dispute as to the meaning and effect of the contract. The question, as the Lord Ordinary, I think, very accurately says, is not one of degree, but of identification. If the ship was during the prohibited time, within the district described by the word "St. Lawrence," as here used, there is a defence. It is now admitted that she was within the Gulf of St. Lawrence and was not within the river of St. Lawrence, and the one question is whether "no St. Lawrence" means neither in the gulf nor the river, or means only not in the river.

In *Uhde* v. *Walter* (1) where the ship was insured from London to "any port in the Baltic," and was lost when proceeding to Revel in the Gulf of Finland, Lord Ellenborough said, "I think it is clearly competent to the plaintiff to prove that the Baltic is nomen generale, comprehending in common understanding the gulfs and inlets which communicate with the sea laid down as the Baltic in geographical charts. If the Gulf of Finland is to be considered as the Baltic, the ship was sailing on the voyage insured at the time of the capture, and there can be no objection to admit evidence as to the understood limits of any particular sea." And independent of the high authority of Lord Ellenborough, I think that in applying a local description to the particular spot some evidence must be admissible.

But the evidence received here does not go further than to shew that several persons, having no better means of judging than the Court, have formed an opinion one way, and several others have formed the opposite opinion. Some of the plaintiffs' witnesses shewed that their opinion was sincere, for they sent ships insured under a policy like this into the gulf during the prohibited period; and if a loss had occurred, and the underwriters had, knowing where the ship had been, settled the loss, that would have been, I think weighty evidence. Some of the defendants' witnesses shewed that their opinion was unreal, for they underwrote ships at a lower premium than they would have done if they had believed the ship was to enter the gulf during the prohibited period; and if any loss had been claimed, and on the underwriters making the objection the assured had submitted, that would have been weighty evidence. As it is, I think the evidence produced leaves the case as it was before.

Reliance was placed by some of the judges below on the maxim "fortius contra proferentem." I do not think the descrip-

(1) 7 June, 1811; 3 Camp. 16.

tion of the district excluded can be considered as the words of one party more than the other. The shipowner knowing where he is likely to employ his ship, and that he does not intend to use her in some district, generally puts on the slip a description of that district in order to induce the underwriters to agree to a lower premium.

I am by no means prepared to say that in some cases where the description of the excepted district is special, it may not be right to say that these are the words of the assured. But where the description is, like this, general, I think that the assured has a right to suppose that the underwriters understand that description as they ought to understand it. It is alike for the interest of assured and underwriters that the description should be definite; and that is attended to in the warranty "no British America between the 1st of October, and the 1st of April." No one could imagine that there was a material difference in the risk between a voyage from the most northern part in the United States, and one from the most southern part of British North America, or between a voyage commenced on the last day which is not prohibited, and one commenced on the first day which is prohibited. But a fixed limit is agreed on to prevent disputes.

I think that the Court should take judicial notice of the geographical position and the general names applied to such districts as this, in short, of all that we see on the Admiralty chart of this part of the sea. I do not know whether the first discoverers of America called the gulf that of St. Lawrence, and then gave the same name to the river, or vice versâ, nor do I think it material. The name has for many years been applied to both. I think, that applying the name as we find it used, in charts and by geographers, to a well defined district, it includes both the river and the gulf.

LORD WATSON:—

The appellants, in their pleadings, allege, as matter of fact, that, by the general custom of merchants, the words "warranted no St. Lawrence," in a policy of marine insurance, include both the gulf and the river of that name. The respondents, on the other hand, aver that, according to mercantile custom, these words refer exclusively to the river St. Lawrence, and also that, assuming the truth of the appellant's allegations, the *L. de V. Chipman* was not navigated within the limits of the gulf. In the Court below, the parties were allowed and led proof of their respective averments; but, in the arguments addressed to the House, it was admitted, on both sides of the bar, that the appellants and the respondents have equally failed to prove the statements which they made on record.

It must, therefore, be taken as an established fact that there was a breach of warranty through the vessel being navigated within the limits of the Gulf of St. Lawrence, during the voyage, in the course of which she was lost, if it be held that the warranty applies to the gulf. In that case, it follows that the respondents cannot recover, under the policy, either the average loss accruing during the deviation, or for the total loss which subsequently occurred.

In the absence of evidence sufficient to shew that a technical meaning has been attached to the words "no St. Lawrence;" or (it is probably more accurate to say) in consequence of its being established by the evidence that the words have no technical meaning, it becomes necessary for the Court to construe them, and in construing them, I apprehend that it is perfectly legitimate to take into account such extrinsic facts as the parties themselves either had, or must be held to have had, in view, when they entered into the contract of insurance. The evidence of both parties was very properly directed to the statements of fact upon which they relied in their record, to which the proof allowed was necessarily limited, and the result is that upon various matters which it might have been of importance to investigate, we have no information. But there are certain facts, established by the respondents' as well as the appellants' evidence, which appear to me to be very useful in considering what significance must be attached to the expression "no St. Lawrence." These facts are, (1), that there is a gulf, well defined by the peculiar contour of its shores, into which a great navigable river debouches, and that both gulf and river bear the same name, St. Lawrence; (2), that, although there are ports within the gulf to which there is a separate shipping trade, yet, for many trading purposes the gulf and the river are parts of the same navigation; and (3), that during several months of the year the navigation of both is exceptionally dangerous.

Two at least of the three learned judges who formed the majority of the Second Division have held that "no St. Lawrence" must be applied to the river only, on the ground that the expression is ambiguous, and that the ambiguity must be solved adversely to the appellants, because "the underwriters are the proferentes with regard to a policy of insurance." That the underwriters may be rightly held to be the proferentes with regard to many conditions in a policy I do not doubt; whether they ought to be so held depends, in each case, upon the character and substance of the condition. In the present case there are many considerations which lead to the inference that the clause in question is not one constructed and inserted by the appellants alone, and for their own protection merely. It was, in point of fact, inserted in the contract by the agent of the respondents; and it is in form a warranty by them that their vessel will not be navigated in certain waters, a matter which it was entirely within their power to regulate. These considerations point rather to the respondents themselves being the proferentes; but I think the substance of the warranty must be looked to; and that, in substance, its authorship is attributable to both parties alike. The main object of the clause is to define the limits within which the vessel is to be kept whilst she is navigated under the policy; and that appears to me to be as much the concern of the shipowner as of the underwriters. To define the limits within which the vessel is to be navigated, for the purposes of a time policy, is, in principle, precisely the same thing as to describe the voyage for which a vessel is insured under an ordinary policy. In both cases it is a definition of the subject-matter of the insurance, a term of the contract, the settlement of which must, in my opinion, be regarded, in a case like the present, as the deliberate act of both parties.

Although the rule of construction contra proferentem may not apply, I think it was rightly argued for the respondents that, seeing the clause in question occurs in the shape of an exception from a leading term of the policy which gives the vessel leave to navigate in any waters, it can only receive effect in so far as it is plain and unambiguous. But I am not satisfied that there is any ambiguity, such as will avail the respondents, to be found in the clause when it is read as a whole. The ambiguity, according to the argument of the respondents, consists in this, that the words may denote either the river, or both gulf and river, and according to the view taken by Lord Young consists in their being applicable either to the river, or to the gulf, or to both. It is not matter of dispute that the name "St. Lawrence" is applicable to the gulf and also to the river, and that, as suggested by Lord Young, it is equally correct to designate the gulf and river as the gulf and river of St. Lawrence; and if one could conceive a case of the words "St. Lawrence" standing by themselves in a policy, without any qualifying context, they certainly would be ambiguous, if not unintelligible. But in the present case any ambiguity which might otherwise have arisen is expelled by the word "no." It is a universal negative, and in my opinion, excludes all navigable waters, salt or fresh, bearing the name of St. Lawrence, which can reasonably be held to have been within the contemplation of the parties to the policy. If the river had been the only navigable water in North America known as St. Lawrence, and there had been elsewhere a gulf of that name, I might have hesitated to hold that the latter was within their contemplation; but the gulf and river of St. Lawrence are so intimately connected, and the perils attendant upon their winter navigation so much akin, that I have come to the conclusion that the warranty must be held to exclude both.

Being of the same opinion with the Lord Ordinary and Lord Craighill, I agree with your Lordships that the interlocutor of the Second Division ought to be reversed, and that of the Lord Ordinary restored.

Interlocutor appealed from reversed; and appeal allowed with costs.

Lords' Journals, 17th March, 1884.

Solicitors for appellants: *Waltons, Bubb, & Walton*, agents for *J. & J. Ross, W.S.*

Solicitors for respondents: *Thomas Cooper & Co.*, agents for *Archibald & Cuningham, W.S.*

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LAWS AND OTHERS . . . . IMPUGNANTS;

AND

SMITH . . . . PROMOVENT.

THE "RIO TINTO."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF GIBRALTAR.

Maritime Lien—Vice-Admiralty Jurisdiction—26 & 27 Vict. c. 24, s. 10, sub-s. 10—Necessaries.

No maritime lien attaches to a ship in respect of coals or other necessaries supplied to it.

Vice-Admiralty Courts have not (apart from statute) more than the ordinary Admiralty jurisdiction, i.e., as it existed before 3 & 4 Vict. c. 65, enlarged it. The Vice-Admiralty Act, 1863 (26 & 27 Vict. c. 24), s. 10, sub-s. 10, does not create a maritime lien with respect to necessaries supplied within the possession.

APPEAL from a judgment of the Vice-Admiralty Court (Feb. 2, 1883), whereby the appellants and their bail were condemned in the sum of £312 and costs.

The facts are stated in the judgment of their Lordships.

The learned judge decided in favour of the respondent that the coals and other articles were necessaries within the meaning of 26 Vict. c. 24, s. 10, sub-s. 10, and that they were supplied on the credit of the vessel. He treated the right of the respondent as, or as equivalent to, a maritime lien, and held therefore that it survived the transfer of the vessel to the appellants. He further held that the respondent had used all due diligence in asserting his lien.

Cohen, Q.C., and *Phillimore*, for the appellants, contended that assuming that coals were necessaries no maritime lien attached to

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* *Present*:—LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR JAMES HANNEN, and SIR ARTHUR HOBHOUSE.

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the ship: *The Neptune* (1). As to the effect of 3 & 4 Vict. c. 65, which enlarged the old jurisdiction of the Admiralty Courts, see *The Alexander* (2); *The Bold Buccleugh* (3); *The Australia* (4); *The Two Ellens* (5); *The Gustaf* (6); *The West Friesland* (7); *The Ella A. Clark* (8). With regard to the Admiralty Court Act, 1861 (24 Vict. c. 10), see *The Skipwith* (9); *The Pacific* (10); *The Mary Ann* (11). Reference was made to the Vice-Admiralty Court Act, 1863 (26 & 27 Vict. c. 24), s. 10: see *The Two Ellens* (12). Assuming that there was a maritime lien, the respondent did not use due diligence in asserting it: *The Bold Buccleugh* (13): *The Europa* (14): *The Charles Amelia* (15). Reference was also made to *The Druid* (16).

Meadows White, Q.C., and *Bigham*, Q.C., for the respondent, contended that, having regard to the above cases and enactments, a maritime lien was established; that this case was within the meaning and purport of 26 & 27 Vict. c. 10, sub-s. 10, which conferred jurisdiction in respect of necessaries on Vice-Admiralty Courts; that so conferring jurisdiction carried with it the creation of a maritime lien for such necessaries; and that the lien had not been forfeited by any laches.

Phillimore, replied.

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The judgment of their Lordships was delivered by—

SIR JAMES HANNEN:—

The *Rio Tinto*, a British steamer, of which George Hough was owner and master, was in the year 1879 engaged in the Mediterranean trade. In October of that year, she put into Gibraltar and, being in want of coal, obtained from a firm there, trading under the style of the London Coal Company, of which the respondent, W. J. Smith, was the managing partner, a supply to the amount of £72 10*s.* 9*d.*, and, on subsequent occasions obtained further supplies, as follows:—

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(1) 3 Knapp. 94.

(2) 1 Wm. Rob. 288; 1 Notes of Cases, 188.

(3) 7 Moore, P. C. 267.

(4) Sw. 480.

(5) Law Rep. 3 A. & E. 345; 4 P. C. 161.

(6) Lush. 508.

(7) Sw. 454.

(8) Br. & L. 32; 32 L. J. (P. M. & A.) 211.

(9) 10 Jur. (N.S.) 445.

(10) Br. & L. 243.

(11) Law Rep. 1 A. & E. 8.

(12) Law Rep. 4 P. C. 161.

(13) 7 Moore, P. C. 285.

(14) Br. & L. 89.

(15) Law Rep. 2 A. & E. 330.

(16) 1 Wm. Rob. 399.

	£	*s.*	*d.*
1879, November 13th . . .	107	11	8
1880, May 6th	132	14	11
„ July 10th	56	6	1

In August, 1880, she again required coals, but as the previous quantities had not been paid for, the agent of the London Coal Company refused to furnish more, but ultimately did so to the extent of £67 1*s.* 5*d.*, upon a guarantee for that amount being given by the ship's broker in London. This sum was afterwards paid.

The *Rio Tinto* did not again put into Gibraltar while Hough remained owner or master. On the 17th of September, 1880, Hough sold the vessel to one Baldwin, who, on the 14th of October, 1881, sold it to the appellants. Both Baldwin and the appellants purchased without notice of any claim against the vessel in respect of the coals supplied by the respondent's firm.

On the 27th of December, 1881, the *Rio Tinto* again put into Gibraltar, when she was arrested in the Vice-Admiralty Court of that place at the suit of the respondent for the coal supplied in October and November, 1879, and May and July, 1880.

At the hearing of the cause in February, 1883, the learned judge of the Vice-Admiralty Court pronounced for the claim of the respondent for the coals as necessaries, holding that this claim created a maritime lien which attached to the ship from the time of the supply, into whosoever possession she might come, and could be enforced in the Vice-Admiralty Court as against a subsequent purchaser without notice, and he further held that the respondent had not by laches on his part lost the right to enforce his claim.

Several questions were raised by the appellants in the Court below, which have been abandoned before their Lordships. It is not now disputed that the coals were supplied by the respondent on the credit of the owners, and it is admitted that the coals

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were necessary, but it is contended (1) that no maritime lien attached to the ship, and (2) that if it did, it was lost by laches.

The case in so far as it affects the jurisdiction of Vice-Admiralty Courts is of considerable importance, and as the decisions bearing on the subject are not uniform it may be advisable to review them with some minuteness.

It was long ago decided in the Courts of Common Law, and finally held by this tribunal, in the case of *The Neptune* (1), that material men never had any lien on the ship itself in respect of supplies furnished in England, and the language of Lord Tenterden in his treatise on shipping was adopted as correct. "A tradesman who has furnished ropes, sails, provisions, or other necessaries for a ship is not, by the law of England, preferred to other creditors, nor has he any particular claim or lien upon the ship itself for the recovery of his demands," and the reason of this, as the learned author states in an earlier passage, is because the law of England never had adopted the rule of the civil law with regard to necessaries furnished here in England. It has also been held by this tribunal that Vice-Admiralty Courts had not (apart from statute) more than the ordinary Admiralty jurisdiction, "that is, the jurisdiction possessed by Courts of Admiralty antecedent to the passing of the statute 3 & 4 Vict. c. 65, which enlarged it."

It follows, therefore, that (apart from statute) a Vice-Admiralty Court had not jurisdiction to enforce any claim by way of maritime lien on the ship itself for necessaries supplied in the circumstances of this case.

But it is contended for the respondent that such jurisdiction has now been conferred by the 10th section of the Vice-Admiralty Act, 1863 (26 & 27 Vict. c. 24), sub-s. 10, by which jurisdiction is given in respect of "claims for necessaries supplied in the possession in which the Court is established to any ship of which no owner or part owner is domiciled within the possession at the time of the necessaries being supplied."

Before considering the effect of this sub-section, it is necessary to examine some previous kindred enactments, and the first of these is the 3 & 4 Vict. c. 65, s. 6, "the High Court of Admiralty

(1) 3 Knapp, 94.

shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or seagoing vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or seagoing vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered, or damage received, or necessaries furnished, in respect of which such claim is made."

The effect of this enactment first came under consideration in *The Alexander* (1). There necessaries were supplied to a foreign ship prior to the passing of the Act. Proceedings were subsequently taken under the 6th section, and it was held that the Court had jurisdiction. Some remarks of Dr. Lushington have a bearing on the present question; he says, "In the first place the statute does not create a lien at all;" and after reading the section he proceeds, "the Court shall have jurisdiction; it simply gives the Court jurisdiction in any and every lawful mode which the Court has the power of exercising. I wish to draw attention particularly to the fact that no lien whatever is established by the Act."

The next case to which it is necessary to call attention is *The Bold Buccleugh* (2). That was an action for damage done by a Scotch steamer to an English vessel in the Humber. The vessel was arrested at Hull, after sale, to a purchaser, without notice of the claim against her in respect of the damage, and it was held by this tribunal that damage creates a maritime lien on the ship causing the damage, and that such lien travels with the thing into whosesoever possession it may come, and when carried into effect by a proceeding in rem, relates back to the period when it first attached.

It is to be observed that this was a suit for damage, as to which there is now no doubt that it creates a maritime lien. Upon this point their Lordships remark, "But it is further said that the damage confers no lien upon the ship, and a dictum of Dr. Lushington, in the case of *The Volant* (3), is cited as an authority for

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(1) 1 Wm. Rob. 288; 1 Notes of Cases, 188.

(2) 7 Moore, P. C. 267.

(3) 1 Wm. Rob. 387.

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this proposition. By reference to a contemporaneous report of the same case (1), it seems doubtful whether the learned judge did use the expression attributed to him by Dr. W. Robinson. If he did, the expression is certainly inaccurate, and being a dictum merely, not necessary for the decision of the case, cannot be taken as a binding authority." The decision, therefore, in *The Bold Buccleugh* (2) that damage confers a maritime lien, valid against a subsequent purchaser without notice, and that this lien may be enforced under the 6th section of the 3 & 4 Vict. c. 65, does not govern the present case, where the question is whether the mere conferring upon Vice-Admiralty Courts jurisdiction over claims for necessaries in certain cases carries with it the creation of a maritime lien for such necessaries.

Some passages, however, in the judgment in *The Bold Buccleugh* (2) appear to have led Dr. Lushington to the conclusion that he was bound by that decision to hold that the 6th section of the 3 & 4 Vict. c. 65, did create a maritime lien in the case of necessaries as well as in the case of damage. In *The West Friesland* (3) he held that coals supplied to a foreign steamship were necessaries, and that they created a lien under 3 & 4 Vict. c. 65, s. 6, which continued, notwithstanding the sale of the ship, if there were no laches. And in *The Ella A. Clark* (4) the same learned judge held that a claim for necessaries supplied to a foreign ship might be enforced by proceedings in rem under the 6th section, notwithstanding a subsequent and bonâ fide transfer to a British owner, and he says (p. 36): "It is true that in *The Alexander* (5) I am reported to have said that the Act of 3 & 4 Vict. did not create a lien, though it gave a remedy against the ship. I intended to state that there might be a distinction between a provision for proceedings by arrest of the ship and the express creation of a lien, and to leave all such questions open. The case of *The Bold Buccleugh* (2) however renders the discussion of this matter useless."

With regard to these cases their Lordships have only to repeat what was said of them in the judgment of this tribunal in the case of *The Two Ellens* (1). "These decisions may be supported upon the ground that though it is perfectly true that the only words used in the section are 'that the High Court of Admiralty shall have jurisdiction' (which words seem hardly sufficient in themselves to create a maritime lien), yet, looking at the subject-matter to which that section relates, it appears designed to enlarge the jurisdiction which the Court of Admiralty already had in matters forming the subject of a maritime lien. There are strong grounds for holding that as respects salvage and as respects collisions, which already gave a maritime lien when they occurred on the high seas, it was intended that they should also when they occurred in the body of a county equally give a maritime lien; and that being so as to salvage and collision it might well be said that 'necessaries' immediately following, it was intended that the same rule should apply in the case of necessaries."

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(1) 1 Notes of Cases, 508.

(2) 7 Moore, P. C. 267.

(3) Swa. 454.

(4) Br. & L. 32; 32 L. J. (P. M. & A.) 211.

(5) 1 Wm. Rob. 288; 1 Notes of Cases, 188.

In the present case, however, it will be found that the creation of the alleged maritime lien is made to depend solely on the words "the High Court of Admiralty shall have jurisdiction," which as their Lordships in *The Two Ellens* (1) pointed out, are not sufficient in themselves to create a maritime lien.

The Admiralty Court Act, 1861 (24 Vict. c. 10), and the decisions upon it must next be considered. By the 5th section it is enacted that the High Court shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the Court that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales.

Dr. Lushington was at first disposed to hold, on the supposed authority of *The Bold Buccleuch* (2), that this section gave material men a maritime lien (*The Skipwith* (3)), but he afterwards in *The Pacific* (4) gave a considered judgment to the effect that the 5th section of the Act of 1861 confers no maritime lien on the material men, but only the right to sue the ship. In *The Mary Ann* (1) he developed his views on the subject more fully. He there says (p. 11), "There is a clear distinction between a maritime lien and a claim the payment of which the Court has power to enforce from the ship and freight. A maritime lien springs into existence the moment the circumstances give birth to it, as damage, salvage, and wages; but it does not follow that because a claim may by Act of Parliament be enforceable against the res that, therefore, it is created a maritime lien. Besides, looking at the whole Act, it is impossible to maintain that a maritime lien is created by every one of the numerous sections which commence with the words, 'The High Court of Admiralty shall have jurisdiction.' In some of the sections these words are accompanied by a proviso incompatible with a maritime lien, as is pointed out by Mr. Maclachlan in reference to the 4th section, and as the Court has held with regard to the 5th section in the case of *The Pacific* (2). So, also, it could hardly be argued that it was intended to create a maritime lien by the 8th section, in favour of co-owners, or by the 11th section in favour of mortgagees. In my opinion, the words 'the High Court of Admiralty shall have jurisdiction,' mean only what they purport to say, neither more nor less, that is, that the Court shall take judicial cognizance of the cases provided for. By themselves the words leave open the question whether or not a maritime lien is created. The answer to this question depends upon other considerations."

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(1) Law Rep. 3 A. & E. 345; 4 P. C. 161.

(2) 7 Moore, P. C. 267.

(3) 10 Jur. (N.S) 445.

(4) Br. & L. 243.

It appears to their Lordships that this reasoning, which was adopted by this tribunal in the case of *The Two Ellens* (3), is applicable to the question now under consideration. The 10th section of the Vice-Admiralty Act, 1863, is divided into eleven sub-sections. The 10th, relating to necessaries, is immediately preceded by one relating to claims between owners, as to which it cannot be supposed that it was intended to confer a maritime lien, yet the two sub-sections are equally governed by the same introductory words:—"The matters in respect of which the Vice-Admiralty Courts shall have jurisdiction are as follows."

It has been argued that a different construction to that which

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(1) Law Rep. 1 A. & E. 8.
(2) Br. & L. 243.
(3) Law Rep. 3 A. & E. 345; 4 P. C. 161.

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the 5th section of the Admiralty Act, 1861, has received, should be put on the 10th sub-section of the 10th section of the Vice-Admiralty Act, 1863, because by the latter the jurisdiction is made to depend on there being no owner domiciled in the possession at the time of the necessaries being supplied. But in the absence of a domiciled owner credit is probably given to the ship, and there is, therefore, in such a case reason for giving the Vice-Admiralty Court of the place jurisdiction, which would include the power to proceed in rem, but it does not suggest a reason why the fresh incident of a maritime lien should attach from the time of the supply, a lien which is to travel with the ship into whosesoever hands she may pass, yet only capable of being enforced at one place.

Their Lordships are thus led to the conclusion that there is nothing from which it can be inferred that by the use of the words "the Court shall have jurisdiction" the Legislature intended to create a maritime lien with respect to necessaries supplied within the possession. Adopting this view, it becomes unnecessary to determine whether or not, if such a lien had existed, it was lost by any laches on the part of the respondent.

Their Lordships will humbly advise Her Majesty that the judgment of the Vice-Admiralty Court be reversed, with the costs of this appeal and the costs in the Courts below.

Solicitors for appellant: *Flux & Leadbitter.*
Solicitors for respondent: *Stocken & Jupp.*

[PRIVY COUNCIL.]

J. C.*
1884
Feb. 6.

UNION STEAMSHIP COMPANY OF NEW ZEALAND, LIMITED . . . . . . } PLAINTIFFS;

AND

MELBOURNE HARBOUR TRUST COMMISSIONERS . . . . } DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Melbourne Harbour Trust Act, sect. 46—*Notice of Action—Interpretation—Acts divided into Headings.*

Held, that an action against the Melbourne Harbour Trust Commissioners was an action brought against a "person" within the meaning of sect. 46 of the Melbourne Harbour Trust Act; and that notice in writing thereof complying in form or in substance with the requirements of the section was necessary.

Remarks as to the effect upon interpretation of dividing an Act into parts with appropriate headings.

Eastern Counties and London and Blackwall Railway Companies v. *Marriage* (9 H. L. C. 32), distinguished.

APPEAL from a judgment of the Supreme Court (Sept. 5, 1882), discharging a rule calling upon the respondents to shew cause why the verdict in their favour should not be set aside, and why instead thereof a verdict should not be entered for the appellants pursuant to leave reserved at the trial, and determining that a plea pleaded by the respondents which had been demurred to by the appellants was good in substance. For a report of the case in the Court below, see 8 Vict. Law Rep. (Law), 167.

The principal question was whether the respondents were entitled to receive notice of action by virtue of sect. 46 of the Melbourne Harbour Trust Act, 1876.

The proceedings are stated in the judgment of their Lordships.

Macnaghten, Q.C., and *J. D. Wood* (*Davey*, Q.C., with them), for the appellants, after contending that the letter of the 21st of October, 1881, was a sufficient notice under sect. 46, assuming any to be necessary, argued that the section did not apply to actions brought against the Melbourne Harbour Trust Commissioners. On the first point, they submitted that the terms of those notices should not be strictly construed, and that the letter was a sufficient intimation: *Smith & Co.* v. *The West Derby Local Board* (1); *Jones* v. *Bird* (2); *Jones* v. *Nicholls* (3). Upon the second point, they contended that "person" in sect. 46 did not include "corporation," but was confined to "officers," in accordance with the heading of the part of the Act in which the section occurs: *Eastern Counties and London and Blackwall Railway Companies* v. *Marriage* (4). Sect. 46 must be prefaced with the words "and with respect to officers be it enacted," &c. [Lord Blackburn:—The Commissioners being a corporation can only act through officers, and it would be strange that officers should have notice and not the Commissioners.] *Bryans* v. *Child* (5).

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* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

Webster, Q.C., and *Malleson*, for the respondents, were not called on.

The judgment of their Lordships was delivered by

Sir Robert P. Collier:—

The facts of this case, as far as they are material, may be shortly stated. The cause of action is that a vessel belonging to the plaintiffs, and going into Melbourne Harbour, fell foul of a cable attached to the anchor of a dredge which was in the middle of the stream, having been placed there by the defendants, and thereby sustained considerable damage. The declaration contained two counts, one alleging negligence on the part of the defendants in mooring the dredge where they did, and the second complaining that they had not given notice whereby the danger might have been avoided. To this declaration there were many pleas by the defendants, denying their liability, and also denying most of the allegations in the declaration; and there was a further plea, in these terms:—"And for an eighth plea to the said declaration, the defendants say that the alleged grievances were committed by the defendants after the passing of the Melbourne Harbour Trust Act, 1876, and were committed by the defendants under and by virtue of the said Act; and no notice in writing of the intention to sue out the writ in this action was delivered to the defendants or left at their usual place of abode one month before the suing out of the said writ, pursuant to the said Act." The plaintiffs demurred to that plea, and also joined issue upon all the allegations contained in it. Upon the case going down for trial the jury found all the questions which may be said to relate to the merits of the case in favour of the plaintiff; but the judge, nevertheless, thought that a verdict should be entered for the defendants upon this plea. The jury, therefore, by his direction, assessed damages contingently; and leave was given to the plaintiffs to move to enter a verdict for them for the amount of those damages. That rule, coming before the Supreme Court, was discharged, and judgment was entered for the defendants. Against that judgment the present appeal is brought.

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(1) 3 C. P. D. 423.

(2) 5 B. & Ald. 837.

(3) 13 M. & W. 361.

(4) 9 H. L. C. 32.

(5) 5 Ex. 368.

The argument upon this appeal has been restricted to two questions, with which alone their Lordships propose to deal. The first question was whether, assuming a notice of action to be necessary, one was given; and, secondly, whether a notice of action was necessary. The 46th section of the Melbourne Harbour Trust Act is in these terms:—"All actions to be brought against any person for anything done under this Act shall be commenced within six months after the act complained of was committed, and no writ shall be sued out against nor any copy of any process served upon any person for anything done by him under this Act until notice in writing of such intended writ or process shall have been delivered to him or left at his usual place of abode by the agent or attorney of the party who intends to cause the same to be sued out, or served at least one month before the suing out or serving the same. Such notice shall clearly and explicitly set forth the nature of the intended action and cause thereof, and on such notice shall be endorsed the name and place of abode of the party intending to bring such action, and the name and place of business of his attorney or agent." Then it goes on to say that the defendant may plead the general issue, and that he may tender evidence.

It is contended that a letter written by Messrs. McMeckan, Blackwood, & Co., agents of the plaintiffs, on the day after the accident occurred, is a sufficient notice of action under this Act. The letter is as follows:—"Union Steamship Company, Limited, Melbourne, 21st of October, 1881. The secretary, Melbourne Harbour Trust Commissioners.—Sir, we have the honour to bring under your notice a very serious accident that happened to *Rotorua* steamer, owned by this company. When coming up the river yesterday morning, and close to the Junction Point, and a little way below the *Platypus*, she struck the chain of that dredge, it being laid in mid-channel. The damage sustained is of an extensive character." Then the damage is specified. "The surveyors are now surveying, and may yet discover further damage. Possibly you may desire to send some of your officers to view the extent of the mischief, all of which we must hold the Commissioners responsible for."

It appears to their Lordships that the Court below were right in holding that this was not a notice of action in compliance with the statute. It was clearly not intended to be. It does not give notice of any intended writ or process whatever: it does not clearly and explicitly set forth the cause or nature of the action: it does not give the name or place of business of the attorney or agent who is to bring the action. It appears to want all the necessary characteristics of a notice of action as prescribed by the statute.

Some cases have been quoted for the purpose of shewing that notices of action are not to be construed with extreme strictness, a rule to which their Lordships subscribe. Cases have been quoted in which notices of action have been upheld which would have been bad upon special demurrer, or perhaps upon general demurrer; but those cases have no bearing on the present, where the notice of action is not, in form or substance, a compliance with the Act.

The question which remains is whether or not the defendants are entitled to a notice of action. "In the construction and for the purposes of this Act the following terms shall, if not inconsistent with the context or subject-matter, have the respective meanings hereby assigned to them." Then come these words:—"Person shall include a corporation." It, therefore, lies upon the counsel for the plaintiffs to shew that to hold that a person in sect. 46 includes a corporation is inconsistent with the context or subject-matter. The argument to this effect is that sect. 2 declares the Act to be divided into parts, and part 2 is headed "officers;" that when we come to part 2, in sect. 33, we find the heading "officers" and a number of sections grouped together under that heading; that, therefore, the word "person" in sect. 46 must be confined to "officers." The case in the House of Lords of the *Eastern Counties and London and Blackwall Railways* v. *Marriage* (1), has been cited as an authority for this argument on the part of the plaintiffs. It should be observed as to that case, which dealt with the construction of the Lands Clauses Act, that in that Act were several headings so drawn as to be applicable grammatically to the sections which followed them. The heading then in question was this: "And with respect to small portions of intersected land, be it enacted as follows." Then came two sections: first, the 93rd, relating to lands not being situated in a town; and then the 94th, beginning with "If SUCH land shall be so cut through and divided." It was held by the House of Lords that "SUCH land" referred, not to land mentioned in sect. 93, but referred back to the heading before sect. 93; namely, "with respect to small portions of intersected land, be it enacted as follows."

That case appears to their Lordships to have no application to the present. Here the heading "officers" is not such a heading as could be grammatically read into any of the sections which follow. It seems to their Lordships to have been inserted for the purpose of convenience of reference, and not intended to control the interpretation of the clauses which follow. It may be, indeed, that the fact of a clause being found in a certain group may in some cases possibly throw some light upon its meaning; but it appears to their Lordships that the construction contended for on the part of the plaintiffs that the term "officers" controls the meaning of the word "person" in sect. 46,

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(1) 9 H. L. C. 32.

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applying it solely to officers and negativing its application to a corporation, is untenable. If we examine the clauses which follow under the head of "Officers," we find that they do not relate solely to officers or to their powers or to their duties. The very first section which follows this heading, (sect. 33,) gives to the Commissioners power "from time to time to appoint a secretary, treasurer, and clerk, and appoint or employ such engineers, surveyors, collectors, and other officers, servants, and persons to assist in the execution of this Act as the Commissioners shall think necessary or proper." This section, therefore, under the heading of "Officers," confers not merely powers upon officers, but a most important power upon the Commissioners; a power without which they would be unable to act, for a corporation can only act through its officers. There are further provisions in sect. 40, enabling them to appoint a harbour-master and so on. It appears to their Lordships that, powers having been given to the Commissioners under these sections to appoint officers, and they being capable only of acting through their officers, it was a very proper and convenient place to insert a section which determined under what circumstances actions should be brought against them in respect of the acts of their officers. Accordingly, sect. 46 appears to their Lordships to be quite in its proper place, putting the interpretation upon it that it refers to actions brought not only against officers for anything done under the Act, but against the Commissioners themselves for anything done by their officers on their behalf; and all reasoning and probability would point to this having been the intention of the legislature. It would be almost impossible to give any good reason why officers should be entitled to a notice of action, and the Commissioners not; or why officers should be entitled to tender amends, and the Commissioners should not.

Their Lordships will humbly advise Her Majesty that the judgment of the Court appealed against be affirmed, and that this appeal be dismissed. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Wild, Browne, & Wild.*
Solicitors for respondent: *Wadeson & Malleson.*

[PRIVY COUNCIL.]

LETTERSTEDT (NOW VICOMTESSE MONTMORT) . . . . PLAINTIFF;

AND

BROERS AND ANOTHER . . . . DEFENDANTS.

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Feb. 27, 28; 29; *March* 22.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Equitable Jurisdiction—Removal of Trustees.

There is a jurisdiction in Courts of Equity to remove old trustees and substitute new ones in cases requiring such a remedy.

The main principle on which such jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate.

Case in which their Lordships, overruling the decree of the Court below, held that the trustees (the Board of Executors of Cape Town, a body incorporated by an ordinance of the Cape of Good Hope) should, in the special circumstances of the case, be removed without costs of appeal, the Appellant having persisted in charges of fraud which the evidence did not sustain.

APPEAL from certain parts of a judgment of the Supreme Court (July 11, 1879), an order of the same Court (September 14, 1880), and a judgment dated the 2nd of July, 1881.

The subject-matter of the appeal is as to the right of the appellant to have from Frans Jacob Broers, the first named respondent, in his capacity of Secretary to the Board of Executors of Cape Town, an account, supported by vouchers, shewing the amount of a four-sixths share of certain profits to which the appellant is absolutely entitled under the will of her father, the late Jacob Letterstedt, deceased (such account to be taken from the date of the commencement of the administration by the Board of Executors of Cape Town, of the estate of Jacob Letterstedt), and to be paid by Frans Jacob Broers, in his capacity aforesaid, the amount of the four-sixths share of profits, and to have the Board of Executors of Cape Town removed from the executorship of the will, and to have the costs of the action paid by the Board of Executors of Cape Town.

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* *Present:*—LORD BLACKBURN, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

The facts and proceedings are stated in the judgment of their Lordships.

Davey, Q.C., and *Jeune* (*Elgood*, with them), for the appellant, with regard to the order of the 14th of September, 1880, contended that the account prayed for by her should be granted, and that proper vouchers should be produced in support of such account, and that such relief ought not to have been refused by the said order. The appellant was declared by the judgment of the 11th of July, 1879, absolutely entitled to the four-sixths of the profits claimed by her from the decease of the testator, and an account was necessary in order to ascertain them. They contended that the account should be taken from May, 1862, of the business authorized to be carried on by the executors and trustees, with interest and compound interest on the amount of such profits from the time that they came to hands of the executors. The account might proceed upon the assumption that every item of the account was correct up to the end of 1872, and without requiring the defendants to produce vouchers up to that date, and since that date to have vouchers in the ordinary way. Then as regards the judgment of the 2nd of July, 1881, they contended that the Board had committed the several breaches of trust alleged, and ought to be removed. [Reference was made to Story's Equitable Jurisprudence, sect. 1287 *et seq.*, and corresponding passages in Lewin on Trusts.]

[LORD BLACKBURN referred to *Fleming* v. *Craig* (1).]

Mathews, Q.C., and *Rigby*, Q.C. (*Greene*, with them), for the Respondents, the Board of Executors, were ready to submit to inquiry—but inquiry was one thing, an account another. They suggested an inquiry whether the portion of the estate of the testator now existing represents or has been produced by the business authorized to be carried on in accordance with the will, regard being had to the compromise, and on the footing that all accounts are to be treated as final and settled accounts before and after 1872; also as to what portion of the assets, as shewn by the accounts, are attributable to four-sixths of the profits. Then, with regard to the removal of the board, it was contended that they had not been guilty of any misconduct or maladministration.

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(1) 1 Court Sess. Cas. (3rd Series), 850.

E. W. Byrne, for the respondent Giddy, appointed curator ad litem to the person or persons who may be entitled under Jacob Letterstedt's will to any portion of his estate after the death of the appellant.

Davey, Q.C., replied.

The judgment of their Lordships was delivered by

LORD BLACKBURN:—

This is an appeal against part of a judgment of the Supreme Court of the colony of the Cape of Good Hope, dated the 11th of July, 1879, an order dated the 14th of September, 1880, and a judgment of the 2nd of July, 1881.

These judgments and order were made in an action commenced by the appellant in June, 1878, against the defendant Broers, in his capacity of secretary to "the Board of Executors of Cape Town," who are the principal defendants below, and respondents now.

This is a body incorporated by an ordinance of the Cape of Good Hope. It is not necessary to say more of them than that, by the terms of their deed, they might act as executors and trustees, on the terms that they were to have remuneration for so acting.

The other respondent was added during the litigation by directions of the Court below. It is not necessary to notice him further until the costs of this litigation are to be disposed of.

It is desirable, before proceeding to discuss the judgments and order to state so much of the facts as is necessary to make them intelligible.

The appellant is the only daughter of Jacob Letterstedt. She was born on the 13th of May, 1853, and consequently attained

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the age of twenty-one on the 13th of May, 1874, and the age of twenty-five on the 13th of May, 1878.

Jacob Letterstedt, her father, died on the 10th of March, 1862, leaving a will.

This appeal does not require their Lordships to construe that will, and it is not necessary to state its provisions further than is required to make intelligible the questions which their Lordships are called upon to decide.

The testator carried on in his lifetime a brewing distillery and malting business, at two places, Mariedahl and Cape Town, and he directed in his will that this business should be carried on after his death as the same was carried on by him, and that his executors should advance a sufficient capital for the purpose, not exceeding in all £10,000. He makes rather elaborate provisions as to how the business should be carried on by managers; and he directs that the profits of the business should, until his child or children should attain their age of twenty-five years, be divided into six shares, "whereof four shares shall be for the benefit of my child or children, one share to the manager of the business at Mariedahl, and one share to the manager of Cape Town." He appoints David Thompson to be manager at Mariedahl. At Cape Town he appoints Per Oscar Hedelius, and failing him Tobias Spengler. And he directs that in case of a vacancy the executors shall, when requisite, appoint a fit person to be manager. If the manager at Cape Town prefers it, he is to receive an annual salary of £350, with a further allowance of £150 for a clerk, instead of a share in the profits. So long as the business is carried on in the above manner the executors are to appoint two persons to inspect the property and examine the accounts twice in every year, receiving two guineas a day for their trouble.

The testator also at the time of his death carried on a business in partnership with Per Oscar Hedelius under the firm name of Jacob Letterstedt & Co.

There is no direction in the will as to this business; but under the terms of the deed of partnership, paragraphs 13 and 14, it is clear that the testator was not bound to carry on that business after the 1st day of January next ensuing after the death of Per Oscar Hedelius; that is, as he died on the 6th of July, 1863, after the 1st of January, 1864. What might be the obligations of the testator's executors under that deed during the twenty-one months between the death of the testator in March, 1862, and the 1st of January, 1864, it is not necessary to consider; but after that date they had no authority to carry on the business.

The following parts of the will may conveniently be read now:—

> "I declare that in case my said daughter shall marry and have a son or sons, such son or the eldest son shall upon his attaining the age of twenty-one years be absolutely entitled to the house and premises situated No. 5, Heeren Gracht, including the stores, Nos. 3, 4, and 5, Castle Street, or in case the same shall have been sold, the proceeds of the sale of the said house, premises, and stores, provided that until such son of my said daughter shall attain the age of twenty-one years, my said daughter shall receive the rents of the said property, or the interest of the proceeds thereof, if sold as aforesaid. And I declare that the second son or such other younger son of my said daughter as shall take my name shall be entitled to the amount of a certain policy effected with the Alliance Life and Fire Assurance Company, London, upon my life for the sum of three thousand pounds, executed in the year one thousand eight hundred and fifty, with the interest which shall have accrued thereon from my death when he shall have attained the age of twenty-one years. And in case there shall be no such son the same shall fall into and become part of my general estate. And I declare that my said executors shall be entitled to administer the said house, premises, and stores in Heeren Gracht and Castle Street, or the proceeds thereof, until the same shall devolve upon my grandchildren, and shall also administer the amount of the said policy of insurance and accumulations, until my grandson herein mentioned shall become entitled thereto, or until the same shall fall into my general estate."

The importance of this is that it shews that some at least of the trusts to be administered by the executors did not terminate on the appellant attaining the age of twenty-five years. And in the possible event of her dying before her children attain twenty-one; the question who are to be the trustees during their minority may be of practical importance.

Then, after giving some legacies, he proceeds:—

"And I devise and bequeath all the rest, residue, and remainder of my estate, property, and effects, as well moveable and immoveable, and wheresoever situate, and whether the same be in possession, reversion, remainder, or expectancy, which shall remain after payment of my just debts and funeral and testamentary expenses, and not hereby otherwise disposed of, unto my said daughter if and when she shall attain the age of twenty-five years, or marry under that age, the same to be bound with fidei commissum, so that my daughter may enjoy the interest, dividends, and annual income thereof to be paid to her annually upon her receipt, or in case of her absence from the place of residence of my executors upon a power of attorney to be executed by her, and which interest, dividends, or annual income shall not be under the control of any husband whom she may marry, but shall be applied solely for her use and benefit, and after her death the said residue shall be paid and belong to her child and children upon such child or children attaining the age of twenty-one years being male, or attaining twenty-one years, or marrying with consent of parents or guardians being female: and if she shall die without leaving any child or children who being a son or sons shall live to attain the age of twenty-one years, or being a daughter or daughters shall live to attain that age or marry, I devise and bequeath my estate, property, and effects subject to the legacies and bequests hereby given to the person or persons who, according to the law at the Cape of Good Hope, would be entitled thereto if I died intestate and unmarried. If I should leave any child or children hereafter born, who being a son or sons shall attain the age of twenty-five years, or being a daughter or daughters shall attain that age or marry under it, I declare that such child or children shall participate in all the legacies, bequests, and benefits hereby given to my said daughter in equal shares with her, and in that case I revoke and withdraw from this will the last clauses hereinbefore contained. And I direct that all moneys and effects which shall accrue by way of rent, profits of business, or otherwise, shall be paid to the Board of Executors, as follows, that is to say, the said rent within six months after the same shall become due, and the said profits within six months after the books shall be closed, and the profits of the business ascertained.

"I appoint Stads Kadet Carl Johan Malmsten, of Stockholm, Iven Gustav Letterstedt, and Rich Antiquarian B E Hildebrand, guardians of my daughter and of any other child I may leave during their minority; and in case of the death, resignation, or incapacity of any such guardians, or of any guardians to be appointed under this power, I empower the surviving or continuing guardian or guardians, or the executors or administrators of the last surviving or last acting guardian, to appoint a new guardian or guardians in the place of the guardian or guardians so dying, resigning, or becoming incapable. It is my wish that my said daughter, or any other child I may have, shall be educated in the Lutheran religion, and shall reside in Sweden after she or they shall have attained the age of thirteen years. I appoint Tobias Spengler, Per Oscar Hedelius, and the Board of Executors, Cape Town, the executors of my will and testament, and administrators of my estate, with all such power and authority as is required in law, and especially the power of assumption, substitution, and surrogation.

"I give to the said Board of Executors an annuity of one hundred pounds sterling so long as the business at Mariedahl shall be carried on.

"I declare that if any dispute should arise between the executors hereby appointed the same shall be decided by the vote of the majority, the Board of Executors having in such case one vote as if consisting of one person. I desire that an inventory shall be made of my estate within six weeks after my death, or if I shall die while absent from the Cape of Good Hope within six weeks after information of my death shall be received within the colony. I direct that my executors shall render to the guardians a full and particular annual account of all receipts and payments in respect of my estate, with proper vouchers for the same."

The will was proved on the 19th of May, 1862, by the three executors, Per Oscar Hedelius, who died in 1863, Tobias Spengler, who died in 1866, and the Board. No fresh executors were appointed under the power of assumption, substitution, and surrogation which the testator especially conferred on his executors, and so in 1866 the Board were the sole executors and trustees under the will. After the death of Spengler certain directors of the Board took the management of the Cape Town business.

The testator, who was by birth a Swede, and who by his will desired that his daughter after attaining the age of thirteen, which she did in 1866, should reside in Sweden, appointed as guardians Swedish gentlemen, no one of whom resided in the colony, or had as far as appears any connection with it. It can hardly be supposed that if the testator had foreseen what was going to happen in 1866, he would have wished the trusts of his will to be administered thus; and it is not surprising that in 1871, when the appellant was growing up, the state of things became such that she was, or her advisers were, discontented.

On the 11th of April, 1872, the guardians announced to the Board that, one of the guardians having resigned, they had appointed Madame Lydia de Jouvencel, the mother of the appellant, to be co-guardian in his room. This information was conveyed in a long and ably argued letter, which, though signed by and in the name of Mr. Malmsten, one of the Swedish guardians, bears internal evidence of having been, in part at least, drawn up by a lawyer, probably Mr. C. A. Fairbridge, who represented the appellant in the subsequent litigation. This letter may be considered as the commencement of the litigation between the appellant and the respondent.

In October, 1872, the other guardians resigned, leaving Madame Jouvencel sole guardian. An action was commenced in the name of Mr. C. A. Fairbridge as curator ad litem of the appellant, then a minor. On her attaining the age of twenty-one it was amended so as to make the appellant herself the plaintiff. The object of the action was to surcharge the executors with sums stated as amounting to £28,512 2*s.* 4*d.*, which they had allowed to themselves in the accounts of the business carried on by them.

Had that action been tried out to the end and a regular judgment obtained, the plaintiff and defendant would have been bound by its result as to the matters involved in that action, but either might, if so advised, have brought other actions for other matters. But a compromise was come to, the terms of which were sanctioned by the Court in a judgment which is as follows:—

"The Court grants judgment accordingly in terms of the said consent paper, which is in the words and figures following, that is to say:—

"It is hereby agreed that judgment shall be entered in favour of the plaintiff upon the following consent paper:—

"'1. That the defendants shall, on account of the charges at the rate of five per cent. on the gross sales claimed in this action, refund the sum of £21,000 (including a sum of about £8000 lying undrawn in the defendants' hands), in settlement of every claim or demand that can or may be made on the defendants in connection with their administration of the estate of the late Jacob Letterstedt, and of all transactions relative thereto, or business connected therewith, up to the 31st of December, 1872, inclusive.

"'2. That the said sum of £21,000 shall be taken to include any amount which may be claimable and payable to Mr. Thompson in his capacity as manager at Mariedahl, for his one-sixth share of the profits of the brewery and distillery business up to the said 31st of December, 1872, and that subject to such claim or demand of Mr. Thompson the said sum of £21,000 be brought up and accounted for to the estate in a liquidation account to be forthwith framed, £1000, part of the said £21,000, to be paid to Mr. Thompson forthwith in cash.

"'3. That the several liquidation and all other accounts made out up to and including the 31st of December, 1872, relative to the administration of the estate or of the business heretofore carried on in connection therewith, shall be considered finally approved and for ever settled and confirmed by this judgment.

"'4. That Miss Letterstedt within six months from this date shall come to an arrangement with the executors as to the future conduct of the business undertaking, and the control of the property acquired after the death of Mr. Letterstedt.

"'5. That failing such an arrangement, Miss Letterstedt shall either take over the property acquired after the death of Mr.

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Letterstedt, or shall authorize a sale thereof by the Board of Executors, failing which the Board of Executors shall be authorized to make a sale thereof, so that the executors may be placed in a position to carry out Mr. Letterstedt's will, and limit their administration to the property and business authorized by the will.

"'6. That the acceptance of the annuity of £100 bequeathed by the testator to the Board of Executors shall not disentitle them to commission or remuneration from and after the 31st of December, 1872, in like manner as if the said bequest had never been made.

"'7. That no commission on gross sales be charged since this action or thereafter.

"'8. That the defendants pay the costs of this suit.'"

The Board of Executors rendered liquidation accounts subsequent to the 31st of December, 1872, which have been investigated in this action.

The appellant, during the interval between the compromise and the commencement of this action, succeeded in establishing a claim to "her legitimate portion." The effect of this was greatly to reduce the amount subject to the trusts of the will.

The appellant, on attaining the age of twenty-five, commenced the action in which the judgments and order now appealed against were made.

By the first eighteen paragraphs of the declaration the appellant sought an investigation of the accounts from the date of the appointment of the executors, and relief thereupon, and she claimed the right of conducting the testator's business.

By the 19th paragraph she charges the Board with various acts of misconduct and malversation, mostly before 1873, and these are so expressed as to impute to the Board, or at least to those for whom the Board was civilly responsible, that they were instigated by a corrupt motive. And then, in the 20th paragraph, she prays that the said Board may be removed from the said office of executors under the said will, and that proceedings for the appointment of another executor or executors in the place of the Board may be directed to be taken.

This statement is, their Lordships think, all that is necessary to render intelligible the first judgment appealed against.

That judgment is as follows:—

"First Judgment.

"1st. That the compromise effected in 1874, in terms of which judgment was given by consent on the 26th of November, 1874, was a final settlement of everything before the 31st of December, 1872, inclusive, and cannot in this action be reopened or set aside.

"2nd. That the accounts after the 31st of December, 1872, be referred to James Rose Innes, Esq., advocate, assisted by Mr. Syfret, the accountant.

"3rd. That plaintiff is absolutely entitled to the four-sixths of the profits claimed by her.

"4th. That plaintiff is absolutely entitled to take over the business for her life, and to manage it as she thinks proper, proper inventories to be taken, and also to the use of the ten thousand pounds sterling invested in the business.

"5th. That the question of the removal of the executors be reserved until the report is presented.

"Question of costs also reserved."

The appellant had not at any time taken steps to set aside the compromise on any ground whatever. It has been contended on her behalf that the compromise should be construed as only applying to the questions raised in the action. But their Lordships think that the Court below rightly held that it was impossible to construe the compromise, and particularly the 1st and 3rd paragraphs of the compromise, in so narrow a sense. This was, indeed, hardly contested on the argument before their Lordships, They think therefore that the 1st paragraph of the judgment of the 11th of July, 1879, was right.

The 3rd and 4th paragraphs are not complained of, and their Lordships are not called upon to say more as to them than that the four-sixths of the profits to which the plaintiff is declared to be absolutely entitled must mean the four-sixths from the time when the business began to be carried on by the trustees.

The 2nd paragraph of the judgment was right, as far as it went, but at the very first meeting before the referee it appeared that it did not authorize the referee to investigate a question which, as it did not affect the liability or responsibility of the respondents, was not settled by the compromise, viz., how much of that sum which, on the assumption that every item of the accounts before the 31st of December, 1872, was correct, the respondents had in hand belonged absolutely to the plaintiff, and how much was part of those sums in which she had only a life interest. The plaintiff asked the referee to determine that question; the executors objected; the referee could not act; and the plaintiff moved the Court in the terms mentioned in the next order. On the 14th of September, 1880, it was ordered "that the plaintiff's application for an order on the said first-named defendants to make and deliver to the plaintiff an account, supported by vouchers, shewing the amount of the four-sixths share of profits, commencing with their administration of the estate as executors, be refused, with costs." This is the order secondly appealed against.

The judges' reasons for this order nowhere appear. The argument in support of it at the bar was that the order applied for was too large, and that as prayed for it was to have an inquiry not limited, as the proposal made before the referee was limited, by having the inquiry made on the assumption that every item of the accounts before 1873 was correct, and that it was intended to open up the questions which by the first paragraph of the judgment of the 11th of July, 1879, were settled, or at least that an order granted in the terms prayed for would have had that effect.

This seems to their Lordships a sufficient ground for not granting an order in the terms prayed for, but not a sufficient ground for refusing an inquiry as to how much the plaintiff held in her own right absolutely, and how much was only to be enjoyed by her for life. Their Lordships therefore think that this order should be varied. It seems probable that when the inquiry is made it will require nothing more than a dissection of the figures, but this cannot be certainly known, and the Court should take whatever steps are necessary for making the inquiry effectual, and do whatever is proper when its result is known. Their Lordships will afterwards state what they conceive should be the form of inquiry.

The final judgment of the 2nd of July, 1881, after confirming the final report of the referee, directs "that the prayer for removal of executors be refused, plaintiff to have her costs out of the estate up to the first hearing. Defendant (the executors) up to that time to pay their own costs, and also the costs of the reference as to accounts, and of this final hearing, with the exception of costs of the last reference as to the 4396*l.* 12*s.* 3*d.* which are to be paid by plaintiff. The curator to have his costs out of the estate."

Their Lordships have felt much anxiety about this judgment.

The 19th, 20th, and 21st paragraphs of the plaintiff's declaration are in the following terms:—

"19. And the plaintiff further says that the said Board of Executors has since its appointment as executors by the said master as aforesaid been guilty of misconduct in its trust and malversation in its administration of the estate of the said testator, in this, to wit:—

"(1st.) The said board has improperly, illegally, and in abuse and breach of its trust as executors, contrary to the true intent and meaning of the said will, and in order to profit from the commissions which would be payable to it, employed and invested part of the estate of the said testator in the said trade or business of Jacob Letterstedt & Co., and in speculations and transactions connected therewith, and gave improper credit, whereby losses have been incurred which have been charged and debited against the said estate to its great damage and detriment.

"(2nd.) The said board has wrongfully and unlawfully charged and appropriated to itself a commission of 10 per cent. upon its transactions in connection with the said trade or business of Jacob Letterstedt & Co., whereas it was only entitled, even if it was right and lawful to charge a commission at all, to a commission of not more than 5 per cent. upon the said transactions, the amount of the commissions so improperly charged in excess of the said rate of 5 per cent. being a very large sum of money, of which the said Board has refunded £21,000 and no more.

"(3rd.) That the said board has made out the accounts which have been rendered and filed by it in an improper and misleading way, in order to conceal the amount of commission really charged by it, and the said accounts have not been supported by vouchers, and the vouchers thereof have been withheld, the said accounts also having been purposely different as to the said commission from the books from which they purported to be taken.

"(4.) The said Board has wrongfully and unlawfully, and in abuse and breach of its trust as executors, applied and expended large sums of money belonging to the said estate in the purchase of landed property, machinery, and the erection of buildings, such expenditure not being required for the purpose of carrying out any of the provisions of the said will, and having entailed a heavy loss and charge upon the testator's said estate.

"(5th.) The said Board has wrongfully, unlawfully, and negligently omitted to invest the annual proceeds of the said estate after deduction of such annual payments as had to be made out of the same for the benefit of the heiress and residuary heirs of the said testator, and has, in like manner, neglected and omitted to invest the share of the profits which the plaintiff was entitled to as aforesaid for the benefit of the plaintiff, as directed by the said will.

"(6th.) The said Board has, contrary to the true intent and meaning of the said will, and without regard to the true interests of the said estate, abused the power entrusted to it by the said will, by instituting the said Board, or some of the members thereof on its behalf, to the office of manager of the testator's business in Cape Town, in order by so doing to retain and appropriate to itself the salary by the said will appointed to be paid to the manager of the said business in Cape Town.

"(7th.) The said Board, contrary to the meaning and intention of the said will, which directed that two Commissioners should be appointed to examine the said testator's business books, accounts, stock and other matters in his estate, has from time to time, to wit, from the year 1862 to the year 1872, appointed two members of the said Board to be such Commissioners.

"20. And the plaintiff further says that, in consequence of the said acts of misconduct and malversation, and of other matters and things hereinbefore referred to, the said Board has ceased to be fit and proper to be entrusted with the administration of the said estate, and has forfeited its claim to retain the office of executors under the said will. Wherefore the plaintiff prays that by judgment of this honourable Court the said Board may be removed from the said office of executors under the said will, and that proceedings for the appointment of another executor, or other executors, in the place of the said Board may be directed to be taken.

"21. And the plaintiff lastly prays that, with regard to the several matters hereinbefore set forth, she may have such further and other relief as to this honourable Court may seem fit, and that the defendant in his said capacity may be ordered to pay the costs of this suit."

The whole of the matters which have been complained of, and the whole that, if this judgment stands, may yet have to be done by the Board, are matters which they had to do, as having accepted the burthen of carrying out the trusts which on the true construction of the will were imposed upon them, and so become trustees. What they had to do as executors merely, such as paying debts, collecting assets, &c., have long ago been over, and by the terms of the compromise the plaintiff cannot now say they have not been done properly. There may be some peculiarity in the Dutch Colonial law, which made it proper to make the prayer in the way in which it was done to remove them from the office of executor; if so, it has not been brought to their Lordships' notice; the whole case has been argued here, and, as far as their Lordships can perceive, in the Court below, as depending on the principles which should guide an English Court of Equity when called upon to remove old trustees and substitute new ones. It is not disputed that there is a jurisdiction "in cases requiring such a remedy," as is said in Story's Equity Jurisprudence, s. 1287, but there is very little to be found to guide us in saying what are the cases requiring such a remedy; so little that their Lordships are compelled to have recourse to general principles.

Story says, s. 1289, "But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

The reason why there is so little to be found in the books on this subject is probably that suggested by Mr. Davey in his argument. As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported. It is to be lamented that the case was not considered in this light by the parties in the Court below, for, as far as their Lordships can see, the Board would have little or no profit from continuing to be trustees, and as such coming into continual conflict with the appellant and her legal advisers, and would probably have been glad to resign, and get out of an onerous and disagreeable position. But the case was not so treated.

In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case.

The first and most obvious fact that arrests the attention is the entire change which events made in the position of the Board from that which the testator assigned to it. His will is marked by much caution. He appointed three executors. If they differ the majority is to prevail, the Board voting as one person. The different branches of the business are to have each its own manager, with a substantial remuneration. Paid commissioners are to examine the stock and the accounts at frequent intervals. On failure of executors powers are given to appoint new ones. It is quite conceivable that the testator thought that, with such safeguards, it would be for the benefit of all that the Board should perform, and be paid for performing, the necessary work. But it is difficult to suppose that he would wish it to be the sole executor, as it became and remained, managing one branch of the business through its own directors, and appointing no examining commissioners except persons connected with itself.

It is true that at the present time the functions of the trustees are of a simple character, perhaps extending little further than the safe custody of the trust estate. But the death of the plaintiff leaving infant children would alter that state of things; and questions might then arise both concerning the brewery business and the rest of the estate, not far differing from those which have caused so much dissatisfaction.

From the course which has been pursued below there has been no full inquiry as to what took place before the 1st of January, 1873, and the charges in the first head of paragraph 19, of mala fides and corrupt motive cannot perhaps be said to be disproved,

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but they certainly are not proved, and are such as ought not to be assumed without proof to be well founded.

The terms of the compromise bind the plaintiff to treat the result of the breaches of trust to have been such that she elected as most for her benefit to adopt them, and take the things as they stood, rather than undo the whole and take an account. Their Lordships see no reason to doubt that her advisers exercised a sound discretion in advising her to take that course, but it is enough to say that she elected to take it. And the same remark applies as to the 4th, 5th, 6th, and 7th heads. The compromise equally binds the defendants in so far as they admit that a very considerable sum beyond what they were entitled to had been taken by them.

The third head seems to be true so far as that the accounts rendered to the guardians were not so full as they ought to have been, and did not disclose the amount of commission taken by the Board, though before the first action, which resulted in the compromise, or at all events before the compromise itself, the appellant and her advisers had the deficient information supplied. The latter part of the third head, though, as already said, it cannot perhaps be said to be disproved as to what took place before 1873, is certainly not proved, and is of such a nature as not to be assumed without proof.

As regards the accounts after 1872, their Lordships find it difficult to understand how it was possible for men of business to think themselves entitled to the large sums charged by them in the 11th liquidation account for commission, and disallowed under the second and third exceptions. The commission charged on the sum of £4396 12*s.* 3*d.*, in the 13th liquidation account, and disallowed by the referee, is perhaps more extravagant still. Nor can their Lordships understand, even with all the assistance given by counsel, why the sum in question was entered as it stands in the account. It seems not to have been understood by the plaintiff's advisers, nor by the referee when he made his first report, nor by the executors' advisers when they erroneously consented to have it expunged. Again, it is impossible to suppose that the executors could really have thought themselves entitled to the sums charged by them, but never paid, for taxation in the Master's office.

It has been imputed to the executors at the Bar, that the disallowed charges for commission have been entered in the accounts in such a way as to amount to concealment and bad faith. Their Lordships do not accept that imputation. They think that the eleventh account is clear and explanatory upon its face, however erroneous it may be in principle. So is the thirteenth account to this extent, that on its face it contains an item challenging inquiry. So the nature of the charges for taxation fees is clear enough, only they are not vouched.

But though their Lordships acquit the Board of concealment in these accounts, the spirit which permits such charges is naturally offensive to the appellant and unfair towards the trust estate. They can only be made by persons who are themselves exasperated by the course pursued towards them, and determined to try somehow or other to get remuneration of which they conceive themselves to have been unjustly deprived. The making of such charges, and the vexatious course pursued by the Board in opposing the perfectly reasonable inquiry which the plaintiff asked before the referee, are calculated to introduce additional irritation into a relation which was disturbed enough before. And they have an important bearing on the question whether, in view of the future welfare of the trust estate, it is expedient that the Board should remain trustees.

It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.

Looking therefore at the whole circumstances of this very peculiar case, the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties that may yet have to be performed, their Lordships can come to no other conclusion than that it is necessary, for the welfare of the beneficiaries, that the Board should no longer be trustees.

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Probably if it had been put in this way below they would have consented. But for the benefit of the trust they should cease to be trustees, whether they consent or not.

Their Lordships think therefore that the portion of the final judgment which is, "That the prayer for removal of the executors be refused," should be reversed, and that in lieu of it the Court below should be directed to remove the Board from the further execution of the trusts created by the will, and to take all necessary and proper proceedings for the appointment of other and proper persons to execute such trusts in future, and to transfer to them the trust property in so far as it remains vested in the Board. The rest of the judgment should stand.

It only remains to dispose of the costs of appeal.

Their Lordships think that the appellant not having succeeded in what was one main ground of her appeal, and having persisted in charges of fraud which the evidence does not sustain, ought to bear her own costs of the appeal. The Board having good grounds for thinking that to submit to the appeal would be derogatory to their character, and so injurious to their business, ought not to be made to pay costs, but as they are wrong in resisting the inquiry concerning the profits, and as their removal is held to be necessary, ought to bear their own costs of the appeal. The nominal respondent, Mr. Giddy, whom the Court have appointed to represent the interests of the reversioners, should have his costs of this appeal out of the estate.

Their Lordships consider:—

1. That the judgment pronounced on the 11th of July, 1879, by the Supreme Court ought to be affirmed.

2. That the order made on the 14th of September, 1880, by the Supreme Court ought to be varied and the motion refused, giving no costs to either party.

3. That the judgment pronounced on the 2nd of July, 1881, by the Supreme Court should be varied by discharging so much as directs that the prayer for removal of the executors be refused. And that in other respects such judgment shall be affirmed.

4. That the following directions should be given:—

a. The Supreme Court to take all proper steps for removing the Board of Executors from the further execution of the trusts of the will, and for the appointment of other and proper persons to execute such trusts in future, and for transferring to them the trust property now vested in the Board of Executors.

b. The Supreme Court to ascertain what portion of the property constituting the testator's estate is rightly attributable to the four-sixths of the profits to which the plaintiff is by the judgment of the 11th of July, 1879, declared to be absolutely entitled. For that purpose all proper accounts to be taken and inquiries made; but so that the accounts rendered by the defendants, the Board of Executors, and covered by the compromise of the 26th of November, 1874, and by the final report of the referee in this suit, be taken as finally settled, and be in no respect opened or disturbed.

c. The Supreme Court to do what is right and just when the last-mentioned portion of the testator's estate has been ascertained.

5. That the costs of the respondent R. W. S. Giddy incurred in this appeal be taxed as between solicitor and client, and be paid out of the residue of the testator's estate.

Their Lordships will humbly advise Her Majesty in accordance with this opinion.

Solicitors for appellant: *Venning, Sons, & Mannings.*
Solicitors for respondent Broers: *Flux, Son, & Co.*
Solicitors for respondent Giddy: *Watney, Tilleard, & Freeman.*

[PRIVY COUNCIL.]

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March 4, 5, 6; April 7.

CALDWELL AND ANOTHER . . . . . . DEFENDANTS;

AND

McLAREN . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Act, 12 *Vict. c.* 87, *s.* 5—*Right to float Timber down the Streams—Right to use Improvements without Compensation.*

Held, that the right conferred to float timber and logs down streams by Canadian Statute 12 Vict. c. 87, s. 5, is not limited to such streams as in their natural state, without improvements, during freshets, permit said logs, timber, &c., to be floated down them, but extends to the user without compensation of all improvements upon such streams, even when such streams have been rendered floatable thereby.

Boale v. *Dickson* (13 U. C. C. P. 337) overruled.

Such right is only conferred by the statute during freshets; *quære* as to the rights at other seasons of the year of the parties, that is, of the lumberers on the one side, and the owners of the improvements and the bed of the stream whereon they have been effected, on the other.

APPEAL from a decree of the Supreme Court (Ritchie, C.J., Strong, Fournier, Henry, Taschereau, and Gwynne, JJ., Nov. 28, 1882) reversing a decree of the Court of Appeal for Ontario (Spragg, C.J., Patterson, Morrison, JJ., Burton, J., dissenting, July 8, 1881) which reversed a decree of Proudfoot, V.C. (Dec. 16, 1880), whereby the prayer of the respondent's bill of complaint had been granted.

The circumstances of the case and the proceedings in the suit are set forth in the judgment of their Lordships.

Bethune, Q.C. (of the Canadian bar), and *Jeune*, for the appellants, contended that on a true construction of the statutes in force in the province of Ontario the respondent had no right to prevent the appellants from floating timber and logs down the streams in question. Reference was made to the Statutes of Upper Canada, 9 Geo. 4, c. 4, and 2 Vict. c. 16. Canadian Statutes, 7 Vict. c. 36; 10 & 11 Vict. c. 20; 12 Vict. c. 87; 14 & 15 Vict. c. 123; 16 Vict. c. 191; 18 Vict. c. 84. Consolidated Statutes for Upper Canada, cc. 47 and 48.

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* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

The statutes in question enlarge the common law right, and in the public interest confer the right on every one to float timber and logs down every stream in the province actually available for that purpose. The respondent, moreover, did not assert a right to be paid by the appellants for the use of his improvements; the appellants were willing that he should be paid. But he asserted a right to prevent the appellants from using the stream at all where it passes through his property. The Vice-Chancellor was wrong in holding that *Boale* v. *Dickson* (1) decided that if improvements were necessary to render rivers and streams floatable, then 12 Vict. c. 87, did not apply, and the owner of the soil could exercise his common law right of preventing all intrusion upon his property. That was not the true effect of the decision. If it were, then *Boale* v. *Dickson* (1) was wrongly decided. The right given by the statute applies to all streams and all parts of them, whether floatability is the result of improvements or not. Reference was made to *Bell* v. *Corporation of Quebec* (2).

The Solicitor-General (*Sir F. Herschell*), and *McCarthy*, of the Canadian bar (*F. O. Crump* with them), for the respondent, contended that the streams in question, not being navigable in their natural state, were the private property of the respondent wherever they flowed through the lands of the respondent, and were not subject to any easement. They were made navigable and floatable for timber during freshets by the improvements of the respondent, and did not thereby cease to be his private property, and did not by virtue of the statute or otherwise become available for the appellants. *Boale* v. *Dickson* (1) rightly decided that 12 Vict. c. 87, did not apply to streams which had been rendered floatable by private expenditure. The statute ought to be strictly construed, being in diminution of

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(1) 13 U. C. C. P. 337.

(2) 5 App. Cas. 84, 93.

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private rights. The effect of the decisions in the province of Upper Canada, now the province of Ontario, from the time the said Act first received judicial interpretation up to the present, had been to establish a rule of property law in favour of the respondent, which rule had been acted upon for years, large properties having been acquired and expenditure made on the faith of it. Reference was made to c. 115 of the Revised Statutes of Ontario in 1877, sect. 1; 41 Vict. c. 6, s. 3; *Reg.* v. *Meyers* (1); *Brown* v. *Chadbourne* (2); *Morgan* v. *King* (3); *Thunder Bay River Booming Co.* v. *Speechly* (4); Angell on Watercourses (7th ed.), sect. 539; *Western Counties Railway Company* v. *Windsor and Annapolis Railway Company* (5); *Wells* v. *London, Tilbury and Southend Railway Company* (6); *Lang* v. *Kerr Anderson & Co.* (7); *Metropolitan Asylum District* v. *Hill* (8).

Bethune, Q.C., replied, citing *The Montello* (9).

The judgment of their Lordships was delivered by

LORD BLACKBURN:—

In this case the now respondent, as plaintiff, filed in the Court of Chancery, Ontario, on the 4th of May, 1880, a bill of complaint, and appellants, as defendants, filed an answer on the 11th of August, 1880. Issues of fact were raised, and evidence was heard at great length before Vice-Chancellor Proudfoot, who, on the 16th December, 1880, pronounced this judgment:—

"1. This Court doth declare that those portions of the three streams referred to in the plaintiff's bill of complaint, where they pass through the lands of the plaintiff, described in the said bill, when in a state of nature were not navigable or floatable for saw logs and other timber rafts and crafts down the same, and doth order and decree the same accordingly.

"2. And this Court doth further declare that the plaintiff is entitled to the user of those portions of the said streams where they pass and flow through the lands of the plaintiff in the said bill of complaint described, and to the improvements thereon, freed from the interruption, molestation, or interference of the defendants or either of them, or their or either of their servants, workmen, or agents, and doth further declare that the defendants have no right to the user of such parts of the said streams for the purpose of driving timber and saw logs, and doth order and decree the same accordingly.

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(1) 3 U. C. C. P. 305, 340.
(2) 31 Maine Rep. 25.
(3) 30 Barbour, 9.
(4) 31 Mich. 336.
(5) 7 App. Cas. 178.
(6) Law Rep. 5 Ch. 126.
(7) 3 App. Cas. 535, 546.
(8) 6 App. Cas. 200.
(9) 20 Wallace, 442.

"3. And this Court doth further order and decree that a writ of injunction be awarded to the plaintiff, perpetually restraining the defendants, their servants, workmen, and agents, from interfering with the plaintiff's user of the said streams where they pass through the lands of the plaintiff, described in the said bill, and of the improvements erected on the said streams, and restraining the defendants from using such parts of the said streams and the said improvements for the purpose of driving their timber and saw logs."

This decree was brought by appeal before the Court of Appeal of Ontario, and, on the 8th of July, 1881,

"It was ordered and adjudged by the said Court that the said appeal should be, and the same was allowed without costs; and that the bill of complaint of the said Peter McLaren, in the Court below, be, and the same is, hereby dismissed without costs, except in so far as the costs of the appellants (the defendants in the Court below) have been increased by reason of the motion for an interlocutory injunction, and except their costs of appeal to this Court from the order granting such interlocutory injunction, and as to such excess and costs of appeal, the same are to be paid by the respondent to the appellants forthwith, after taxation thereof."

This order was brought by appeal before the Supreme Court of Canada, and on the 28th of November, 1882, it was ordered by that Court,

"That the said appeal should be and the same was allowed, that the said order of the Court of Appeal for Ontario should be and the same was reversed, and that the decree of the Court of

Chancery of Ontario, dated the 16th day of December, 1880, should be and the same was affirmed.

"And this Court did further order and adjudge that the said respondents should pay to the said appellant the costs incurred by the said appellant, as well in the said Court of Appeal for Ontario as in this Court."

It is from this last order that the present appeal is brought.

There are some things not now in controversy, which it is better to state before examining the allegations in the bill and answer.

The waters which drain from a considerable tract in Upper Canada collect so as to form a river called the Mississippi, which flows down to and into the River Ottawa. There is no controversy as to the Mississippi below a point in the township of Dalhousie called High Falls.

The lie of the country above that point is shewn by a map (Exhibit G) prepared by the plaintiff below (now respondent), and adopted and used on the argument here by the appellants (defendants below).

The waters which flow over High Falls have their origin in a district of considerable dimensions, now divided into several townships. The upper part of this district does not appear to be very steep, though on some of the creeks in it there appear to be rapids. The creeks, at places widening into lakes, finally converge into Cross Lake, in the township of Palmerston. Thence the waters flow in what must be a considerable body of water down a steep and rocky country; and this continues to be the character of the country for some miles. The body of water flowing down this passes over a succession of rapids and waterfalls. The waterfall which is the lowest down is High Falls; below that there is no controversy that the Mississippi is floatable.

All this country was till within the last forty or fifty years in a state of nature, and belonged to the Crown. It was covered with timber, and the waters flowed as the force of gravity directed them.

And now it is convenient to examine the allegations in the bill and answer.

The bill of complaint of the plaintiff was filed on the 4th of

May, 1880, in the Court of Chancery, Ontario. It states that the plaintiff is a timber dealer having his principal saw mill at Carleton Place, a village on the Mississippi, a considerable distance down below High Falls. The defendants also are timber dealers, having their principal saw mill also at Carleton Place.

Both the plaintiff and the defendant have taken from the Crown growing timber on the lands which form the upper townships, the water from which flow over High Falls.

The bill states that the plaintiff is owner in fee simple of several lots. of land. He derives his title from grants by the Crown, some to himself and some to persons from whom he claims by mesne conveyances.

The dates of those grants are all given in the bill; the earliest grant in point of date is one of the 3rd of August, 1853, to one Skead, of lands at High Falls, and the latest in date is one of the 18th of September, 1879, to the plaintiff himself, of lands on one of the creeks above Cross Lake. It is not unimportant to remark that all the grants under which the plaintiff claims are subsequent in date to the Act of 1849.

The bill then contains these statements:—

"8. The plaintiff is also the owner of large tracts of timber land in the aforesaid townships and along the banks and in the vicinity of the said streams, and he has for many years past been using, and is now using, and expects for many years to come, and until the timber on the said land so owned by the plaintiff has become exhausted, to continue to use the said streams for the purpose of driving or floating down his timber and logs to his mill at Carleton Place aforesaid.

"9. The said streams were not navigable streams nor floatable for logs and timber during the time the said lands were vested in the Crown, nor until after the time when the improvements hereinafter referred to were made on the said streams, and when they were in their natural and unimproved state the said streams would not, even during the freshets, permit of saw logs or timber being floated down the same, but on the contrary, were quite useless for that purpose.

"10. The plaintiff is entitled, both as riparian proprietor and as owner in fee simple of the bed of the said streams, where they pass and flow through the said lots, respectively, to the absolute, exclusive, and uninterrupted user of the said streams for all purposes not forbidden by law, and amongst other purposes to the absolute and exclusive right to the user of the same for the purpose of floating or driving saw logs and timber down the same.

"11. The plaintiff has for many years been engaged in the business of lumbering in the said county of Lanark, and at other places throughout this province, and more particularly in the timber region along the banks and in the vicinity of the said streams; and in order to get to his mill at Carleton Place aforesaid, and to market the timber and saw logs cut in that region, the plaintiff and various other persons and firms, the whole of whose rights and interests therein and thereto have been acquired by purchase by the plaintiff, have expended a large amount of money, to wit, not less than $150,000, not only where the said streams run and flow through the lots above described, but at various other parts thereof, over a length of about fifteen miles on the said 'Buckshot Creek,' and a length of about fifty miles on the said 'Louse Creek,' and main branch of the 'Mississippi,' in improving the said streams, by deepening the same, by clearing out therefrom stumps, trees, and débris of all kinds, by erecting dams, slides, and other erections and improvements wherever necessary on the said streams, and occasioned by the existence of rapids, falls, and shallows in the course thereof; and by reason of such expenditure the said streams have become navigable for saw logs and timber which, with the aid of such dams, slides, and other erections, may now be floated down the said streams during the time of freshets, which occur chiefly in the spring of the year.

"12. On the various parts of the said streams, which run and flow through the said lands hereinbefore described, the plaintiff and those through whom he claims the said lands have expended a large amount of money in making certain specific and very valuable improvements, that is to say:"

(The description of the improvement at High Falls may serve as a sample):—

"On the said parcel of land, being the front half of Lot No. 14

in the first concession of the township of Sherbrooke North, the plaintiff, and those through whom he claims the said parcel of land, at a place called 'High Falls,' a portion of the said Mississippi River, which runs through the said lot, having erected a dam across the said Mississippi, where there is a fall of about seventy feet from an island in the centre of the said stream to the south shore thereof, and also a dam between the said island and the north shore thereof, and the said plaintiff, or those through whom he claims, that is to say, the said Skead and Gilmour, or one of them, has formed an artificial stream, consisting of a cutting through rock and earth, and a slide connecting the lake or pond above the said High Falls, on an extension of the said Mississippi River, with the lake or pond below the said falls, which said cutting also passes through the aforementioned lot in the township of Dalhousie, the effect of the building of the said dams at the entrance of the 'High Falls' being to raise the level of the waters in the said pond or lake above the same, and to form a stream in the said cutting or artificial stream as aforesaid made through the said Lot 14 and the said lot in Dalhousie, and thus rendering the same capable of floating saw logs and timber down the same.

"31. The defendants being engaged in their business as hereinbefore alleged, have recently got out of the woods in the said township of Abinger a large quantity of saw logs, to wit, about 9000 saw logs, the whole of which is now lying in or being driven by the defendants down the said Buckshot Creek, and they commenced to enter the said improvements on Buckshot Creek on the 27th of April, 1880, and they have taken them over the improvements hereinbefore particularly referred to, and made as aforesaid on Lot 1 in the third concession of Abinger aforesaid, and they are now driving them down the said Buckshot Creek with the intention of taking, and they threaten and intend to take, them over the other hereinbefore described improvements made as aforesaid on the said Buckshot Creek, and down through the main branch of the said Mississippi, and will do so unless restrained by the order and injunction of this Honourable Court.

"32. The defendants are also taking a quantity of saw logs, about 10,000 in number, down the said Louse Creek, and through the said lands belonging to the plaintiff in the township of Denbigh, and thence down the said stream, and to do this the defendants threaten and intend to avail themselves, and unless restrained by this Honourable Court they will avail themselves, of the said improvements made by the plaintiff and those under whom he claims, and, in so floating and running the said timber and saw logs down the three said streams, the defendants are interfering with and obstructing the plaintiff and his employés in floating and running down the plaintiff's timber and saw logs, to the great damage and injury of the plaintiff, and to the damage and injury of the said improvements.

"33. The defendants, in so floating and running their timber and saw logs down the said streams, are wrongfully and forcibly, and without right or colour of right, making use of the improvements made by the plaintiff and those under whom he claims, and to which, for the reason aforesaid, the plaintiff is entitled to the exclusive and uninterrupted user. . . .

"37. The plaintiff further shews that the defendants have made use of the said streams and the improvements thereon without any authority or license from the plaintiff, and well knowing, as the facts are, that the plaintiff was the owner of such improvements, and that owing to the said improvements, all of which have been made by the said plaintiff or those through whom he claims, the said streams had become useful for the purpose of floating down saw logs and timber, and that before the said improvements were made, and when the streams were in a state of nature, they would not permit of timber and saw logs being floated down the same even during freshets, yet the defendants have never paid to the plaintiff any compensation for the user of the said streams and improvements, and the plaintiff submits that the defendants are liable to pay him compensation therefor, and that this Honourable Court should direct an account to be taken of the amount of compensation which the defendants should pay, and that the defendants should be ordered to pay the same to plaintiffs when so ascertained."

The following are the more material parts of defendants' answer:—

"We are the owners of certain timber limits situated in the townships of Abinger and Denbigh, in the county of Addington, for the purchase of which we paid a very large sum of money.

"The said limits were originally the property of the Crown, and were sold by the Crown Lands Department to one Skead, and we claim title thereto through the said purchaser from the department.

"Our object in purchasing the said limits was to obtain a supply of timber and saw logs for our mills at Carleton Place, and we would not have purchased and paid the price we did for them for any other purpose or object.

"Timber and saw logs, cut and manufactured upon the said limits, can only be brought to our saw mill by means of the Mississippi River, and Buckshot and Louse Creeks, mentioned in the plaintiff's bill, form the only outlets by which the said timber and saw logs from our said limits can be carried to the said Mississippi River.

"We deny the allegations contained in the 9th and 10th paragraphs of the said bill, and, on the contrary, we say that we are informed and believe, and charge the fact to be, that the said Mississippi River and Buckshot and Louse Creeks are all streams which are navigable or floatable for timber and saw logs within the meaning of the statutes in that behalf, and we claim the benefit of the said statutes.

"We deny that the alleged improvements upon the said streams claimed by the plaintiff, confer upon him the rights he claims against us by his said bill, but we have nevertheless been always ready and willing, and before the commencement of the suit we offered the plaintiff, to pay him any proper sum for the use of any of said improvements, or any loss or damage that he might fairly claim to be put to by reason of the passage of our said timber and logs over the said improvements, and we offered to submit the question of the amount we should pay to arbitration, but the plaintiff would not accede to any of our offers."

Strong, J., begins his judgment, by saying:—

"The finding of the learned judge before whom this case was tried, that those parts of the River Mississippi and of Louse and

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Buckshot Creeks, at which the appellant has constructed his improvements, were not originally and in their natural state capable of being used, even in times of freshets, for the transportation of saw logs or timber, was not on the argument of this appeal demonstrated to be erroneous, and a careful perusal of the evidence has led me to the conclusion that an attempt to impugn that finding would have been hopeless, even if we could have entirely disregarded the rule so often laid down in this Court, that the finding of the judge before whom the witnesses were examined is, in the case of contradictory evidence, entitled to the strongest possible presumption in its favour. We must, therefore, assume the facts to be as they are stated in the first declaration with which the decree under appeal is prefaced, namely,—

" 'That those portions of the three streams referred to in the plaintiff's bill of complaint, where they pass through the lands of the plaintiff, when in a state of nature were not navigable or floatable for saw logs and other timber, rafts, and crafts down the same.'

" The appellant's title to the lands upon which he has made the improvements in question, including the beds of the respective streams, was not seriously disputed, and has been established by the production of his title deeds. The question for this Court to determine is, therefore, purely one of law."

To this their Lordships agree. The respondent cannot now contend that timber could be practically floated down those portions of the streams whilst in a state of nature, though not so well or so profitably as after the improvements were made; but the Vice-Chancellor cannot be understood to find that it was impossible to float any timber at all, over High Falls, for instance. In an affidavit used by the plaintiff for the purpose of obtaining an interim injunction, Mr. T. Skead says:—

" I purchased High Falls in the 30th paragraph of the bill referred to from the plaintiff's father, and built the dam and slides there; and about the year of our Lord 1849 I took John Allan Snow, a surveyor, with me and surveyed the whole line of the river from High Falls to Cross Lake, and he and I then drew a plan of the improvements which we thought necessary to make the river navigable and floatable for timber and saw logs, which said improvements were substantially carried out by Messrs. Gilmour & Co., who purchased from me the lands and limits bordering on this portion of the said Mississippi.

"Before the improvements at High Falls, a Mr. Playfair, during the highest freshets, used to run a few hundred logs over the falls, but they were so injured and damaged in their transit thereover, that he told me he would have to give it up. I had not made the slide hereinbefore referred to."

The finding of the Vice-Chancellor must be understood as meaning only that in a commercial sense it could not be done; the timber being so difficult to guide over the falls and so liable to be injured that no one could profitably do it, and consequently no one would do it. And it must be taken as admitted, that at many places above High Falls and for considerable distances, timber could be floated along the streams. Obviously this must have been the case wherever the streams expanded into lakes.

So understanding the finding, the question, which though raised as to many places may most conveniently be dealt with as if it related to one only, seems to be this.

The waters have formed a stream or river, which for many miles is capable of floating logs and timber, at least during the freshets, down towards a market, but at a part of it where the soil on both sides of the stream belongs to the plaintiff, there is a natural obstacle, such as a rapid and waterfall, which renders it impracticable in any commercial sense to float timber down the stream at that part.

The plaintiff, or those through whom he claims, have made improvements, consisting substantially of dams above the waterfall to keep the waters back so as to make the rapid deeper and slower, and made slides over the top of the dam and down to below the falls, so that timber can by means of those slides be carried safely over the waterfall. The defendant proposes to bring his timber from the part of the stream above the obstacle by means of these improvements. He does not claim to do this by any common law right, but by virtue of certain statutes of Upper Canada. And it cannot be disputed that the legislature had full power to confer such a right; whether they have done so or not must depend on the construction of the statutes.

The defendant has always been ready and willing to pay for the use of the improvements; this is obviously fair and just, but it is not pretended that the statutes provide in terms that if he uses such improvements he shall pay for them. Had either of them done so, the intention of the legislature to authorize him to pass over the obstacle by means of the improvements would have been quite clear. The absence of any such provision is strongly relied on as shewing that the legislature did not so intend.

The plaintiff relies on his common law right, as owner of the soil, to prevent any one from using his soil in any way which he does not choose to allow, unless by statute that right is abridged, as it may be.

There has been a considerable diversity of opinion amongst the judges in the Courts below. Their Lordships have perused their opinions with much advantage, and have with great care considered the reasons of those from whom they differ. In the result they come to the conclusion that the judgment of the Court of Appeal for Ontario is right and should be restored.

They think that there can be no doubt that by the law of England the owner of the soil on both sides of a running stream, whether it be navigable or not, is, primâ facie at least, owner of the soil which forms the bed of the stream, and as owner of this land covered by water, has all the rights of a landowner. But this is subject to all rights of the owners above him to have the water flow away from their land, and to all rights of the owners below him to have the flow come down to them as it was wont. It is also subject to any rights which the public have over it.

One of the practically most important rights of the owner of a portion of the soil of the river is the right to use the water for a mill, and in order to do so, or indeed for any other lawful purpose, to erect a dam on it. The public may have rights to navigate the stream, and whenever such a right exists, the right of the millowner and the right of the public come into conflict. They may co-exist, but when they do one or other must be modified.

The right of the public to navigate a stream may be created either by prescription or by dedication by the owner of the soil within time of legal memory. And in an old settled country like England it could seldom be material to inquire further than as to those modes of creating such a right. But when the law of England was taken out to a new unsettled country, where prescription could not exist, and dedication could rarely exist till after the country was to some extent settled, it became important to inquire whether the principles of the common law did not give such a right independent of any user, wherever the stream was, in its nature, capable of being navigated. No question arises in the present case as to this right of navigation; and, at all events up to a period later than 1849, it was a question of great doubt what the law of Upper Canada was on this subject. The right now claimed to use streams, not navigable for general purposes, to float down timber, was one which in England, if it existed at all, from the nature of the country, could not be important: it never came in question in any case of which we are aware. It is one which, in a new wild country overgrown with timber, might be very important, and it must have been a question of doubt what was the right.

The owner of the land covered with water over which a stream flows has the unquestioned right to erect a mill on it, if he does not thereby infringe on any right of the proprietors above or below him, or on the public rights. The doubts as to what was the extent of the public right over such streams cast a doubt on the extent to which it was lawful to erect mill dams.

It is obvious that it was very desirable that, for the purposes of encouraging the development of the country, these doubts should, as soon as possible, be solved. And as the legislature of Upper Canada had full power to enact what should be the law in that country, the real question is what did they enact?

The statutes of Upper Canada have been consolidated and afterwards revised; but the Acts under which this is done are merely consolidation and revision Acts, and do not alter the effect of those statutes which bear on this question. The first statute which it is necessary to notice is the Act of the 25th of March, 1828.

After a preamble that it is found expedient and necessary to afford facility to the inhabitants of the province engaged in the timber trade in conveying their rafts to market (as well as to the ascent of fish) in various streams now obstructed by mill dams, it enacts that every occupier of "any mill dam which *is* or *may be* legally erected," where timber "is usually brought down the "stream on which such dam is erected," shall, under a penalty, "construct and erect a good and sufficient apron to his dam." The 2nd section describes the kind of apron :—such apron shall not be less than eighteen feet wide, by an inclined plane of twenty-four feet eight inches to a perpendicular of six feet, and so in proportion to the height, where the width of the stream will admit of it, where such stream or dam is less than fifteen feet wide, the whole dam shall be aproned in like manner with the same inclined plane."

Without incumbering the case by considering any question relating to the fish, the intention of the legislature seems obvious. They contemplated that there might be mill dams then or thereafter legally erected on streams down which lumber was usually brought. And without inquiring what were the conditions necessary to make such an erection legal, the legislature, for the purpose of affording facility to those engaged in the lumber trade in conveying their rafts to market, impose a duty on the mill-owner to add to his mill an apron so as to let the rafts pass over it. This did, to some extent, impose on the owner of the dam, by supposition legally erected, the burthen without any compensation of building an apron; but it is clear that the legislature did intend for the good of trade to impose that burthen on them. Probably it was not supposed to be very heavy. The Act, however, is in terms confined to those streams down which lumber was "usually" brought.

Several statutes were referred to on the arguments, which their Lordships think do not much affect the question.

Then comes the Act of 30th of May, 1849.

The preamble is, "Whereas it is necessary to declare that aprons to mill dams which are now required by law to be built and maintained by the owners and occupiers thereof in Upper Canada" (obviously referring to the Act of 1828 already cited) "should be so constructed as to allow a sufficient draft of water to pass over such aprons as shall be adequate in the ordinary flow of the stream to permit saw logs and other timber to pass over the same without obstruction." This clearly indicates an intention to throw upon those who have dams "legally erected" upon streams a further burden. The first section with the object contemplated by the preamble cast upon them without any compensation the duty to erect and maintain waste gates, brackets, and slush boards, so as to keep the depth sufficient to allow the passage of "such saw logs, lumber, and timber as are usually floated down such streams," with a proviso that no person shall be required to build aprons or slides on small streams unless required for the purposes of floating down lumber."

The 5th section of this Act goes beyond the object mentioned in the preamble; it is, however, perfectly settled that though the preamble aids in the construction of an Act, effect is to be given to the intention of the legislature if it sufficiently appears though it goes beyond the object of the preamble.

It is upon the construction of this 5th section that their Lordships think this case depends. In the Consolidated Statutes for Upper Canada, cap. 48, it is divided into two sections, sects 15 and 16, and the meaning is made rather clearer by transposing the position of the two provisoes at the end of the section which are made into sect. 16, but there is no alteration in the substance.

The 5th section is in the following terms:—

"That it shall be lawful for all persons to float saw logs and other timber rafts and craft down all streams in Upper Canada, during the spring, summer, and autumn freshets, and that no person shall by felling trees or placing any other obstruction in or across such stream, prevent the passage thereof: Provided always, that no person using such stream in manner and for the purposes aforesaid shall alter, injure, or destroy any dam or other useful erection in or upon the bed of or across any such stream, or do any unnecessary damage thereto or on the banks of such stream, provided there shall be a convenient apron, slides, gate, lock, or opening in any such dam or other structure made for the passage of all saw logs and other timber, rafts, and crafts, authorized to be floated down such stream as aforesaid."

This enactment, it is to be observed, became law in 1849, and has not been altered since. In 1863, the case of *Boale* v. *Dickson* (1) was decided in the Court of Common Pleas of Upper Canada. The question there was as to a claim for the use and occupation of a slide on the Indian River. The Court of Common Pleas thought that if the slide was on a stream within the meaning of the enactment their Lordships are now considering, the plaintiff must fail; whether, if the statute applies, this consequence would follow their Lordships need not stop to inquire. So thinking the Court of Common Pleas put a construction on the Act.

The Vice-Chancellor, in the present case, after the evidence was heard, said, addressing the defendant's counsel:—

"I think, Mr. Bethune, that you stated that if I considered myself bound by the authority of *Boale* v. *Dickson* (1), there was little use in arguing the case. It seems to me that I am bound by that case in this respect, that I ought to be bound by and respect the ruling of a Court of co-ordinate jurisdiction, though not in the same sense as I would be bound to follow a judgment of the Court of Appeal. If the interpretation placed upon it in *Boale* v. *Dickson* (1) be the construction this statute is to bear in regard to improvements upon rivers and their floatability, I understand that case to determine that if any improvements are necessary to render streams floatable, the statute does not apply, that it does not alter the character of the private streams, and that the owner of the land over which the stream flows has the right to prevent intrusion upon it. It therefore comes to be a question of evidence as to whether the streams mentioned here can be considered floatable without artificial aids."

The judges of the Court of Appeal for Ontario all agreed that Vice-Chancellor Proudfoot had correctly apprehended the construction put upon the statute by the Court in *Boale* v. *Dickson* (1), and that he could not properly disregard the decision of a Court of co-ordinate jurisdiction, but all four thought that construction wrong; Burton, J., though dissenting from his brothers, expressly saying:—

"I quite agree with them in their view of the doctrine laid down in *Boale* v. *Dickson* (1), and think there is nothing to warrant the qualified construction placed upon sect. 15 of 12 Vict. c. 87, by the learned judge who delivered the judgment in that case; but I am unable to bring myself to the conclusion that the mere permission or the recognition of the right to float all streams during freshets, make the entire streams 'publici juris,' although, in point of fact, many portions of it may be quite impassable, even in time of freshets, for the smallest description of timber or other article of merchandise."

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(1) 13 U. C. C. P. 337.

The judges in the Supreme Court thought that the construction put upon the statute in *Boale* v. *Dickson* (1) was right, and the Chief Justice, Sir W. Ritchie, thought that, even if wrong, it ought to be maintained on the ground taken by Lord Ellenborough in *Doe* d. *Otley* v. *Manning* (2), that in questions of conveyancing it was important to adhere to decided cases even if convinced they were originally wrong. This doctrine has often been recognised. The maxim "Communis error facit jus" is peculiarly applicable to conveyancing questions. But this is not a question of conveyancing, and their Lordship do not think that there is any ground for saying that *Boale* v. *Dickson* (1), if wrong, should be followed.

And their Lordships agree with the judges in the Court of Appeal for Ontario in thinking that there is nothing to justify any Court in construing the words "all streams" as meaning such streams only as are at all places floatable. They do not think that every little rill, not capable of floating even a bullrush, is a stream within the meaning of the Act. But when once it is shewn that there is a sufficient body of water above and below the spot where the natural impediment exists, though that natural impediment renders the stream at that spot practically unfloatable, it does not make it cease to be a part of the stream in the ordinary sense of the words.

It has been argued that though this might have been the natural meaning of the words, if the enactment had been "that it should be lawful to float saw timber rafts and craft down all streams in Upper Canada at all seasons," that the legislature here confined the enactment to making it lawful "during the spring, summer, and autumn freshets." And that, it is argued, shews an intention to cut down the large words "all streams." Their Lordships do not assent to this argument. Probably the legislature confined the enactment to the seasons during which lumberers ordinarily ply their trade, thinking it better to leave the rights of all parties at all other seasons untouched. Whatever was their motive it seems clear, on the construction of the enactment, that if a lumberer claims a right at any other period than during the freshets to float timber along a portion of a stream, he must rest his claim on something else than this enactment. It is not, however, an objection to his right under this enactment to float during freshets, that he may on the same part of the stream be entitled, on other grounds, to float at all times.

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(1) 13 U. C. C. P. 337.

(2) 9 East, 71.

Their Lordships do not think that the limitation of the right in the stream to one period of the year prevents that from being a part of the stream which would otherwise, in the ordinary use of language, be a part of the stream, even if the existence of an impediment there makes it not practically available for the purposes of the lumberer even in freshets. The respondent's construction of the enactment seems to them to require the introduction by implication of some such words as these, "except on such parts of the stream as are, owing to the presence of an impediment, such as a waterfall, not practically available for the purposes of floating timber until some improvements are made."

There does not seem to their Lordships to be any sufficient reason for implying this or any similar qualification.

It is quite true that it is not to be presumed that the legislature interfere with any man's private property without compensation. But if the whole stream is floatable during the freshets it cannot be doubted that the legislature did mean, with the object of affording facility to lumberers to carry their timber to market, to say that they should have the right to float down the stream at these seasons without obstruction by the owners of the bed of the river without paying them anything. If, as seems to be the opinion of Burton, J., the principles of the common law could be worked out so as to give this right, at any rate the legislature in 1849 did not know this, or mean to declare it. Without declaring what the law then was, they enacted that "from this time, 1849, forward the law shall be as we now enact."

It is, however, quite true that no power is given by the statute to make practically floatable spots which are not so in their natural state, and that the Legislature, who must be taken to know that such streams as this Upper Mississippi were likely to exist in the unimproved parts of the country, must have contemplated that, before the right they gave became practically useful, something must be done which would be a trespass if done without the authority of the owner of the soil.

There does not seem to be any great difficulty in holding that, if all that was done was to remove some existing obstruction, as by blowing up a rock which impeded the passage, and thus putting the bed of the stream into the state in which it would have been if the rock had never existed, a right to float timber down that spot might be exercised, even though the blowing up the rock could not be justified against the owner of it. There is more difficulty in dealing with the case of a dam maintained by or with the assent of the owner of the soil for the purpose of making the part of the stream practically floatable, which was not so in its natural state. There is certainly no obligation on the person who makes and maintains such a dam to continue to maintain it; if he ceases to do so it becomes useless, and can only, if at all, be made useful by forming a joint stock company for the purpose of doing so; and, if the Court of Common Pleas in *Boale* v. *Dickson* (1) were right in thinking that, if the statute applies, a promise to pay slidage for the use and occupation of such works, in consideration that the plaintiff would allow the defendant to use them, could not be enforced, the legislature have improvidently reduced the inducement to make the stream at such a part practically floatable. But, though this may be so, the question remains whether the words of the legislature do not express an intention that, when the part of the stream could be used, it should be lawful for all persons to use it.

It does not seem to their Lordships that the private right which the owner of this spot claims to monopolise all passage there is one which the legislature were likely to regard with favour, and in the earlier legislation they had, without scruple, cast on the owners of dams "legally erected" the obligation, at their own expense, to make such dams passable for lumber; if the law was (contrary to what is laid down in *Boale* v. *Dickson*) (1), that reasonable compensation should be payable for the use and occupation of works maintained for the purpose of rendering the portion of the stream practically useful for floating purposes, there would be no hardship at all; if the legislature had inserted a provision that such should be the law, there could have been no doubt of their intention. They have not inserted such a provision; but, though that makes the case somewhat difficult, their Lordships do not think it enough to justify what seems to them a somewhat violent departure from the plain meaning of the words.

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(1) 13 U. C. C. P. 337.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the Supreme Court should be reversed, and that of the Court of Appeal restored. They do not think there is any reason for departing from the general rule that the costs of the appeal should be borne by the unsuccessful party, the Respondents.

Solicitors for respondent: *Jonas ap Jones.*
Solicitor for the appellants: *Johnston, Harrison, & Powell.*

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(1) 13 U. C. C. P. 337.

[PRIVY COUNCIL.]

J. C.*
1884
March 19, 29.

ORIENTAL BANK CORPORATION . . . APPELLANT;

AND

RICHER & Co., AND ANOTHER . . . . . RESPONDENTS.

TWO CONSOLIDATED APPEALS.

ON APPEAL FROM THE SUPREME COURT OF THE MAURITIUS.

Mauritius Ordinance of 1853, *ss.* 40, 43, 50—*Validity of Adjudication of Bankruptcy.*

The Court of Bankruptcy of the Mauritius has jurisdiction to order adjudication against a firm on the petition of the sole member of that firm. Such order is valid against the petitioner personally.

Under sects. 40, 43, and 50 of Ordinance No. 33 of 1853, a creditor cannot challenge the validity of such order on the ground that the bankrupt has not made it appear to the satisfaction of the Court that his estate is sufficient to pay his creditors at least five shillings in the pound clear of all bankruptcy charges. Such qualified solvency is not a fact to be put in issue and proved, but provisionally to appear to the satisfaction of the Court, the propriety of whose conclusion cannot by any process be contested.

CONSOLIDATED APPEALS from two judgments of the Supreme Court (Jan. 19, 1882, and Dec. 9, 1881) the first-mentioned affirming a judgment of Cox, J., sitting as Commissioner in Bankruptcy (May 9, 1881) the latter reversing a judgment of the said Commissioner, (June 27, 1881). In both appeals the question was as to the validity of an adjudication of bankruptcy purporting to be made against "Fred. Richer & Co.," which adjudication was made on the 20th of January, 1881.

The Bank petitioned that this adjudication should be set aside on grounds which appear in the judgment of their Lordships. Their petition was dismissed on the 9th of May, 1881, and this order was affirmed on the 19th of January, 1882. The Bank then objected to the jurisdiction on the ground that the alleged firm had no existence either in law or in fact, and could not be adjudicated bankrupt as a moral and impersonal being. On the 27th of June the adjudication was declared invalid, as it had been pronounced against a firm, and it had been proved that at the date of adjudication there was no such firm in existence. This order was reversed on the 9th of December, 1881, the Chief Justice observing—"In the present instance, the evidence before us conclusively shews that the real name of Frédéric Richer as a trader, the name by which, and by which alone, he was known in the commercial world, was 'Fred. Richer & Co.,' and it cannot accordingly be seriously contended that the bankrupt is misdescribed. It may, however, be said that he is imperfectly described, that the adjudication should have run against him as 'Frédéric Richer, carrying on business under the name of Fred. Richer & Co.' It is beyond dispute that this would have been a more accurate and perfect description, but is the omission of the words 'Frédéric Richer carrying on business under the name of' a fatal imperfection? If there had been anything to shew that the terms actually used misled, or failed to give notice to any creditor, or were calculated so to do, there might have been much in the objection. But in the absence of any evidence to that effect, and in presence of the uncontroverted evidence of Frédéric Richer that he was 'notoriously' known to be Fred. Richer & Co., I am clear that the imperfection cannot be sustained as a ground for annulling the adjudication."

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* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

Davey, Q.C., and *Linklater*, for the Bank in the first appeal, viz.: that from the order of the 19th of January, 1882, contended that the adjudication was not founded upon any evidence by which the Court could be judicially satisfied that the available estate of the petitioner was at the time of adjudication sufficient to the required extent. [LORD BLACKBURN:—Was it not the policy of the Ordinance merely that the Commissioner should be personally satisfied.] The Ordinance follows the Bankruptcy Act of 1849: see *Re Davis* (1), a decision on sect. 93 of the Act of

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(1) 18 L. T. Rep. 280.

1849: *Anon* (1); *Pennell* v. *Butler* (2); *Re Pearse* (3); and see s. 211 of the Act: *Anon* (4). In the second appeal they contended that the order did not purport to adjudicate Richer personally a bankrupt, and was invalid as against a firm which did not really exist.

SIR ARTHUR HOBHOUSE:—Their Lordships do not desire to hear the respondents in the second appeal.

Cohen, Q.C., and *Kekewich*, Q.C. (*Latham* with them), for the respondents in the first appeal, contended that sufficient evidence of qualified solvency had been given to satisfy the Ordinance, that the Commissioner was satisfied, and that there was no procedure provided by which his decision could be questioned. It was not intended that he should judicially and absolutely determine the point or make the antecedent inquiries which would be necessary for that purpose. Reference was made to sect. 93 of the Act of 1849, repealed by sect. 20 of the Act of 1854; to sect. 96 of the Act of 1861; to the Ordinance, sects. 43, 178, 179: *Pennell* v. *Butler* (5); *Ex parte Claxton* (6).

Davey, Q.C., replied.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

Two questions are raised by the two appeals in this case. One is whether the adjudication of bankruptcy which was passed on the 20th of January, 1881, against Frédéric Richer & Co., is a valid adjudication against Frédéric Richer, who is the sole member of that firm. Their Lordships did not think it necessary to hear the respondents on this question. Nor do they now think it necessary to say anything, except that they concur with the Supreme Court in holding that the defect which undoubtedly appears in the order affords no ground for annulling the adjudication, because it is merely formal, and is not calculated to injure anybody.

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(1) 1 Fonb. 6.
(2) 18 C. B. 209.
(3) 22 L. T. Rep. 160.
(4) 1 Fonb. 15.
(5) 18 C. B. 209.
(6) Law Rep. 7 Ch. 532.

The other question is whether, under sects. 40, 43, and 50 of Ordinance No. 33 of 1853, a creditor can challenge the validity of an adjudication against his debtor, who, being a trader, has been made bankrupt on his own petition, on the ground that he has not made it appear to the satisfaction of the Court that his estate is sufficient to pay his creditors at least five shillings in the pound, clear of all charges of prosecuting the bankruptcy.

The bankrupt, Frédéric Richer, gave, so far as appears on the face of the proceedings, no evidence of this qualified solvency of his estate except the petition and affidavit required by sect. 40. And it is contended that by sects. 43 and 50, the Court is bound to require some further evidence, and to attain the requisite satisfaction on some judicial grounds capable of being tested by the parties concerned, and of being made the subject of contention, and, when necessary, of appeal.

Their Lordships are of opinion that on the true construction of sect. 43 the Judge is to satisfy himself as to the requisite solvency of the estate by such evidence as he thinks fit. The proceedings are ex parte. The matter is one which cannot possibly be the subject of exact proof, and in most cases the proof can be but rough, provisional, or even conjectural. If the question were to be subject to dispute, nothing could solve it short of an administration, or at least an exhaustive and conclusive account, of the estate, and a long litigation might attend this preliminary proceeding. It is not provided by the Ordinance that creditors shall attend the adjudication, and it is not intended that they shall in any way put in issue the fact of qualified solvency.

That being so, is it right that they should by any process bring into contest the propriety of the Court's conclusion? It is a question of difficulty, but their Lordships think it must be answered in the negative. Instead of saying that the qualified solvency shall be proved, the legislature in sect. 43 says that it shall be made to appear to the satisfaction of the Court. The use of that language indicates rather a satisfaction in the personal discretion of the Judge than a judicial process on which issues may be taken and appeals presented. Whether the Court had reasonable ground for the satisfaction which it felt in this case is not the question. The question is whether this particular preliminary to the adjudication can be contested so as to bring the propriety of the adjudication itself into discussion. Their Lordships concur with the Supreme Court in thinking that the adjudication is conclusive upon the point.

Their Lordships will humbly advise Her Majesty that both appeals should be dismissed, and the appellants must pay the costs.

Solicitors for appellant: *Murray, Hutchins, & Stirling.*
Solicitors for respondents: *Freshfields & Williams.*

[PRIVY COUNCIL.]

J. C.*
1884
March 14, 15, 18; *April* 9.

THE QUEEN . . . . APPELLANT;

AND

WILLIAMS . . . . RESPONDENT.

AN APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand Crown Suits Act, 1881, *sect.* 37—*Executive Government—Liability for Negligence—Reasonable Care—Damage to Vessels using the Defendant's Staiths.*

Where the Executive Government possessed the control and management of a tidal harbour with authority to remove obstructions in it, and the public had a right to navigate therein, subject to the harbour regulations and without payment of harbour dues; the staiths and wharves belonging to the Executive Government which received wharfage and tonnage dues in respect of vessels using them :—

Held, that there was a duty imposed by law upon the Executive Government to take reasonable care that vessels using the staiths in the ordinary manner might do so without damage to the vessel. Reasonable care is not shewn when after notice of danger at a particular spot, no inquiry is made as to its existence and extent, and no warning is given.

The principle of liability for negligence established by *Parnaby* v. *Lancaster Canal Company*, (11 Ad. & E. 223,) and *Mersey Docks Trustees* v. *Gibbs*, (Law Rep. 1 H. L. 93,) approved of and applied to the Executive Government in the above circumstances, which were distinguishable in respect of non-receipt of harbour dues; notwithstanding the Crown Suits Act, 1881, sect. 37.

APPEAL from a judgment of the Supreme Court (May 18, 1883) made on a petition of right under the Crown Suits Act, 1881, and discharging a rule nisi for a new trial of issues of fact, which were tried in December, 1882, the jury giving a verdict for the full amount claimed. The grounds upon which this rule nisi was obtained were that the verdict was against the weight of evidence, mis-direction and non-direction, and improper rejection of evidence.

The facts of the case and the proceedings appear in the judgment of their Lordships.

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* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

The case is reported in the Court below, in New Zealand Law Reports (1).

Cohen, Q.C., and *Gorst*, Q.C., for the appellant, contended that the judgment appealed from ought to be reversed or varied, because there was no evidence to shew negligence on the part of the Executive Government, nor any wrong or damage done by it in, upon, or in connection with a public work within the meaning of the Crown Suits Act, 1881. Reference was made to *Mersey Docks Trustees* v. *Gibbs* (2); *Forbes and Another* v. *Lee Conservancy Board* (3); *Lancaster Canal Company* v. *Parnaby* (4). To impute negligence in the circumstances of this case the other side must shew a duty to search for the particular mischief which caused the damage. Unless there was such duty to the knowledge of the party there is no negligent ignorance of the fact which a search would have revealed: *Heaven* v. *Pender* (5). That is so with regard to the liability of a private owner. The character of the river must be attended to. A private owner could not be held to have guaranteed the absence of a snag even opposite his own wharf. The utmost extent of obligation on his part would be to warn the shipmasters as to dangers known to himself. [LORD BLACKBURN:—Does not the rule in *Parnaby's Case* (6) when applied to this involve the duty of periodical investigation? There might be a duty on the dockmaster knowing of a sunken vessel outside the entrance to warn.] There are two limitations to liability alleged in this case, first the danger must be known to the person held liable; second, it must exist on the premises of the person held liable, notwithstanding *Carleton* v. *Franconia Iron and Steel Company* (7). There is no case of liability of a person in fact ignorant of a danger not on his own premises. [LORD BLACKBURN:—The questions are (1) as to reasonable care, (2) as to such care extending beyond the premises.] With regard to the nature of negligent ignorance, see the report of *Mersey Docks Trustees* v. *Gibbs* (8) in the Court below where the facts are more fully given. [LORD BLACKBURN:—Is

(1) 1 C. A. 222; 1 S. C. 217.
(2) Law Rep. 1 H. L. 93.
(3) 4 Ex. D. 116.
(4) 11 A. & E. 223.
(5) 11 Q. B. D. 503, 507.
(6) 11 Ad. & E. 223.
(7) 99 Mass. 216.
(8) 7 H. L. C. 329.

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not negligent ignorance as bad as knowledge?] Negligence in that case was ignorance of a thing sometimes known to be dangerous sometimes not. There is no case which holds a wharfinger liable to make inquiries as to access, nor to search for dangers any more than any other owner of premises. Here the danger was one which was absolutely unknown to the harbour master.

Ollivier, of the New Zealand bar, and *R. W. Cracroft* for the respondent contended that it was not necessary to allege or prove absolute knowledge on the part of the Government of the snag which did the injury. It was sufficient to shew that the Government had negligently and improperly suffered the snag to remain for years alongside the wharf to the great danger of vessels using the same. Even assuming that the danger complained of must be on the premises of the person held liable, still the Crown controls the bed of the river, and therefore the danger was on the appellant's premises. The two leading cases of *Parnaby* (1) and the *Mersey Docks Trustees* (2) have always been followed, and sometimes by stronger cases: see *Winch* v. *Conservators of the Thames* (3) ; *Jolliffe* v. *Wallasey Local Board* (4); *Hammond* v. *Vestry of St. Pancras* (5); *Wilson* v. *Mayor and Corporation of Halifax* (6); *Richardson* v. *Great Eastern Railway Company* (7). As to setting aside the verdict as against the weight of evidence: *Solomon* v. *Bitton* (8); *Bridges* v. *Directors, &c., of North London Railway Company* (9).

Gorst, Q.C., replied.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The respondent in this appeal presented in the Supreme Court of New Zealand, under the provisions of an Act in force in that colony, called "The Crown Suits Act, 1881," a petition of right, in which it was stated that the suppliant was the owner of the

(1) 11 A. & E. 223.
(2) Law Rep. 1 H. L. 93.
(3) Law Rep. 9 C. P. 378.
(4) Law Rep. 9 C. P. 62.
(5) Law Rep. 9 C. P. 316.
(6) Law Rep. 3 Exch. 114.
(7) 1 C. P. D. 342.
(8) 8 Q. B. D. 177.
(9) Law Rep. 7 H. L. 213.

steamship *Westport*, and on the 16th of February, 1882, the steamship entered Her Majesty's port or harbour of Westport, in the county of Buller, in the colony of New Zealand, and, by and under the direction of Her Majesty's harbour master, was moored at the staiths or wharf in the harbour erected by Her Majesty's Executive Government in the said colony for the use and accommodation of vessels frequenting the port; that the harbour at Westport is a tidal harbour, at or near the mouth of the Buller river, and is under the control and management of Her Majesty's Executive Government in the colony, which appoints the harbour master and all other officials exercising control over the same, and the staiths and wharves, and over the movements of all vessels therein, and receives the dues payable in respect of vessels frequenting the port and using the accommodation therein provided; that all wharfage and tonnage rates, and all other rates and dues in respect of the harbour and of the staiths or wharves therein, are payable to and received by the authorities appointed to receive the same by and on behalf of Her Majesty's Executive Government, and on the 4th of March, 1882, £1 1*s.* 11*d.*, by way of dues in respect of the use by the *Westport* of the staiths or wharf and harbour, was paid on behalf of the suppliant, and a receipt given for the same; that prior to the 16th of February, 1882, the *Westport* had frequently visited the harbour, and been laden with coal and general merchandise in the usual and customary manner at the port; that the rise and fall of the tide was at the time of the happening of the events after mentioned eleven feet or thereabouts; that on the 17th of February, 1882, while alongside the wharf or staiths, and being laden with coal and cargo in the usual and customary manner at the port, the *Westport* settled with the fall of the tide upon a snag lying at or near the bottom of the water of the harbour, and was so greatly damaged thereby that the steamer became filled with water, and sank to the bottom of the harbour alongside the wharf or staiths; that Her Majesty's Executive Government in the colony, and the harbour master and other officials exercising authority at the port, were at that time, and for a long time previously had been, well aware of the existence of this snag, and of the danger and risk incurred by vessels moored at and using the staiths or wharf or frequenting and navigating the harbour in consequence thereof, but had negligently and improperly suffered the same to remain there, and no steps whatever had been taken by the executive government or the harbour master or other officials to indicate to masters of vessels frequenting the port the existence of the hidden danger occasioned by the position of the snag, or to warn the master of the *Westport* thereof, and the master was at the time of the accident wholly ignorant of the existence of such danger; that, in consequence of the injuries to the steamer, the suppliant had suffered loss and damage to the amount of £1500 and upwards.

The solicitor of the Supreme Court of New Zealand, duly authorized, and acting for and on behalf of Her Majesty, by his first plea denied all the material allegations in the petition of right, and in his second and third pleas he alleged that there was water to the height of eleven feet, covering the snag at low tide, and the *Westport*, when fully laden, might and could easily and without damage have been hauled over and above the snag in any state of the tide in the harbour whilst loaded, so as to float in the same depth of water fore and aft, but the master improperly loaded the forehold of the steamer so as to cause the bow of it to sink to a depth of thirteen feet six inches or thereabouts, and the stern to sink only to a depth of eight feet six inches or thereabouts, and then and whilst the steamer was so loaded, negligently, carelessly, and improperly hauled the steamer from the berth where she was lying (2nd plea), and on his own responsibility, and without communication with the harbour master, carelessly, negligently, and improperly moved the steamer from the berth where she was lying (3rd plea), and whilst the steamer was being so hauled and moved she struck upon the snag and was injured. The replication to the second and third pleas denied the allegations in them in the terms of the allegations.

At the trial of the issues of fact by a special jury at Nelson, New Zealand, on the 21st and 22nd of December, 1882, the allegations in the petition preceding the allegation of what happened on the 17th of February were either admitted or found to be true, except the allegation that the harbour was under the control and management of the Executive Government, the issue as to this being struck out, and except also the allegation of the receipt of rates and dues, as to which it was found that there are no harbour dues, and the £1 1s. 11*d.* was received for wharfage and tonnage dues.

The other issues, with the findings of the jury thereon, were as follows :—

"9. Did the said steamship *Westport*, on the 17th day of February, 1882, while alongside the said wharf or staiths, settle with the fall of the tide upon a snag lying near or at the bottom of the water of the said harbour ?—Yes, on the obstruction called the vertical snag.

"10. Was the said steamship so greatly damaged thereby that she became filled with water and sank to the bottom of the said harbour alongside the said wharf or staiths ?—Yes.

"11. Was Her Majesty's said Executive Government, at the time of the happening of the events in the said petition mentioned, and for a long time previously, well aware of the existence of the snag which caused the damage, and of the danger and risk incurred by vessels moored at and using the said staiths or wharf, or frequenting and navigating the said harbour, in consequence thereof ?—No ; but after the communication from the harbour master, if proper steps had been taken promptly, they would have been aware.

"12. Did Her Majesty's said Executive Government negligently and improperly suffer the last-mentioned snag to remain alongside the said staiths or wharf, to the great danger of vessels moored at the said staiths or wharf ?—Yes.

"13. Did Her Majesty's said Executive Government take any steps, or did the harbour master or other officials take any steps to indicate to masters of vessels frequenting the said port the existence of the hidden danger occasioned by the position of the said last-mentioned snag, or warn the master of the said steamship *Westport* ?—No.

"14. Was the master of the said steamer *Westport*, at the time of the happening of the events in the petition mentioned, wholly ignorant of such danger ?—Yes.

"15. Could the said steamer *Westport*, when fully laden, have easily and without danger been hauled over and above the said snag in any state of the tide in the said harbour, whilst loaded, so as to float in the same depth fore and aft?—No.

"16. Did the master of the said steamship *Westport* load the forehold of the said steamer so as to cause the bow of the said steamer to sink to a depth of 13 ft. 6 in. or thereabouts, and the stern of said steamer to sink only to a depth of 8 ft. 6. in. or thereabouts?—Admitted. Yes.

"17. Did the master of the said steamer negligently, carelessly, and improperly haul the said steamer from the berth where she had been placed by the harbour master; and did the said steamer then, and whilst being so hauled, strike upon the said snag and suffer the injury in the petition mentioned?—No.

"18. Did the master of the said steamer move the said vessel carelessly, negligently, and improperly?—No.

"19. Did the master of the said steamer move her on his own responsibility, and without communication with the said harbour master, and unknown to the said harbour master?—Yes; but there was an implied permission, according to the usage of the port.

"20. Has the suppliant, in consequence of the injuries mentioned in the said petition, suffer damage and loss; and if so, to what amount?—£1500."

On the 19th of January, 1883, the Supreme Court of New Zealand granted a rule to shew cause why the verdict should not be set aside, and a new trial had, upon the grounds:—

That the verdict is against the weight of evidence on Issue 9.

That the qualification of the answer to Issue 11 is against the weight of evidence, and that the answer to Issue 11 does not sufficiently distinguish the snag referred to.

That the verdict is against the weight of evidence on Issues 12, 17, 18, and 19.

That the learned Judge improperly rejected evidence of the harbour regulations.

That the learned Judge misdirected the jury upon the question of negligence.

That the question of negligence ought not to have been left to the jury.

That the learned Judge ought to have directed the jury that no duty was cast upon the Government of the colony to keep the harbour of Westport clear of snags, of which the Government and its officers were ignorant.

Or, in the alternative, why the verdict should not be entered for the respondent, upon Issues 11 and 12, upon the above grounds."

This rule was discharged by the Supreme Court on the 18th of May, 1883, and the present appeal is from that order. The reasons for the appeal, as stated in the appellant's case, are:—

"1. Because, under the circumstances alleged in the petition, or proved at the trial, it was not the duty of the Executive Government to ascertain whether or not snags might be lying in the river.

"2. Because there was no evidence in support of the allegation imputing to Her Majesty's Executive Government any negligence which occasioned the damage, nor of any wrong or damage done by the Executive Government in, upon, or in connection with a public work, within the meaning of the Crown Suits Act, 1861.

"3. Because the said harbour regulations show that the master, in moving his steamer without the consent or instructions of the harbour master, ought to be considered as having done so at his own risk.

"4. Because the case proved and relied on was inconsistent with that made by the petition."

Before proceeding to discuss what their Lordships consider the real question on the merits, they think it best to dispose of some other questions which have been raised. The harbour regulations for the ports of New Zealand, made by Order in Council, provide that the master of every vessel shall anchor or moor where the harbour master or person deputed by him may direct, and he shall not unmoor or quit the anchorage, nor shall he haul his vessel alongside any public pier, wharf, or jetty without having previously obtained permission from the harbour master or his deputy to do so, and any master offending against this regulation shall be liable to a penalty not exceeding five pounds. The evidence of the mate of the *Westport* was that she crossed the bar of the harbour on the morning of the 16th of

February, 1882, and made fast to the coal staiths under the direction of the harbour master, with the forehatch under No. 1 shoot, head up the river; that the following day, having finished loading the forehold, about 1 or 2 P.M., they slacked astern about 25 feet, to take in a few packages of cargo from the gangway, which they generally do whilst they are loading coal; when they went about 25 feet astern the vessel struck on a snag, which, as the tide fell, made a hole in her bottom. The *Westport* measures about 116 feet from the forehatch to the stern, counting to about the centre of the hatch, and her beam is 23 feet. The snag struck her about 5 feet abaft the mid-ship section on the starboard side of the keel, which was outside as she lay, and at the garboard streak, where she would be drawing about 10 ft. 9 in. of water. As the head ropes were slacked, the current necessarily set the bow out, there being a slight curve in the river at that point. The bow was about 8 feet off the staiths when she struck, and the stern about 15 feet. Opposite the point where she struck, she was about 13 feet from the staiths, and the edge of the hole in her bottom being about 1 foot from her keel, the snag must have been about 25 feet from the staiths.

It may be convenient to notice here the variance between this evidence and the allegation in the petition that the steamer was alongside the wharf or staiths when she settled with the fall of the tide, upon which the 9th issue was framed. As to this the Supreme Court in its judgment says, "There was therefore a variance from the case stated in the petition, inasmuch as the steamer was damaged whilst shifting her berth. But there was no application for a nonsuit upon this or any other ground. Had the objection been made it would have been properly met by the allowance of an amendment in the petition. The question whether the vessel had been moved was not really but only formally in issue between the parties. As regards the suppliant's conduct, the only questions raised were, whether the vessel had been moved negligently so as to cause or contribute to the damage, or illegally. These were the questions which the parties went down to try." And as to the 9th issue, the Court says, "The objection here seems to be that the jury have found that the *Westport* was damaged" while alongside the wharf, "the damage having in fact occurred whilst her position was being slightly altered. But as the vessel was only allowed to move a few feet along the wharf, remaining always connected with it by her head and stern lines and springs, it appears to us that she may properly be said to be injured while alongside." Their Lordships think that the finding of the jury may be so understood, and then it is in accordance with the evidence.

The question whether the steamer was negligently and improperly moved was raised by the 17th and 18th issues. These were answered by the jury in the negative. The evidence of the mate was that the harbour master directs the movements of the vessel if he happens to be there, but he had never objected to their dropping astern to the gangway; that they moved the vessel without his directions and he never complained, it is the custom of the port, of all ports; when the harbour master knew of the accident he did not object that the ship had been moved without his permission; and the harbour master himself, in answer to the question by the Court, "Was it imprudent to move her," replied only that it was unusual. The only ground upon which it can be contended that these issues ought not to have been answered in the negative is that there was a breach of the harbour regulations. The jury found upon the 19th issue that the master of the steamer moved her without communication with and unknown to the harbour master, "but there was an implied permission according to the usage of the port." There was evidence upon which the jury might reasonably find this, and that under the circumstances the master did not negligently and improperly move the vessel. The Supreme Court thought that the defence that the master was doing an illegal act prohibited under a penalty, and that no action could lie for damage to the vessel consequent upon the illegal act, was not raised by the pleas. Their Lordships see no reason to differ from this.

The main question is, whether there was a breach on the part of the Executive Government of that duty which the law would have cast upon private persons maintaining the staiths or wharf and inviting ships to visit them in the same manner in which the Executive Government are shewn to have done.

In the *Lancaster Canal Company* v. *Parnaby* (1), where a company had, under powers given by an Act of Parliament, made a canal for their profit, and opened it to the public upon payment of tolls to the company, it was held by the Court of Exchequer Chamber that the common law imposed a duty upon the proprietors to take reasonable care, so long as they kept it open for the public use of all who might choose to navigate it, that they might navigate without danger to their lives or property. This decision was approved of in the *Mersey Docks Trustees* v. *Gibbs* (2), in which it was held that, if the cause of the injury was a bank of mud in the dock, and if the defendants, the trustees, by their servants had the means of knowing that the dock was in an unfit state, and were negligently ignorant of it, they neglected their duty, and did not take reasonable care that it was fit.

The present case differs from the *Lancaster Canal Company* v. *Parnaby* (1), and the *Mersey Docks Trustees* v. *Gibbs* (2), in that there are no harbour dues, and the public have a right to navigate subject to the harbour regulations, but the harbour is under the control and management of the Executive Government, which has authority to remove obstructions in it. The staiths and wharves belonging to the Executive Government, which receives wharfage and tonnage dues in respect of vessels using them. These are collected by the railway authorities appointed by the government, and the manager of the railway department directs where the vessels which are to load with coals shall be placed. It appears to their Lordships that this case is within the principle upon which the above cases were decided, and upon the facts proved, they are of opinion that the law imposes a duty upon the Executive Government to take reasonable care that vessels using the staiths in the ordinary manner may do so without danger to the vessel.

The principal evidence on this question is the harbour master's, and his letters to the Marine Department of the Government of New Zealand. He first became aware of the existence of a snag near the place where the *Westport* struck at the end of January, 1822, by a vessel called the *Ladybird* touching on it. He sent down a man who was not a professional diver to examine it, and reported to the secretary of the Marine Department. This report is as follows:—

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(1) 11 A. & E. 230.

(2) Law Rep. 1 H. L. 93.

"Harbour Office, Westport,
"27th January, 1882.

"Sir,—I have the honour to inform you that a snag has been recently found at the coal staiths, and lies in the way of ships loading. At low-water spring tides it has about 11 feet on it. Formerly it was not much in the way, but larger and deeper vessels come now for coal, hence the difficulty. Several vessels have been on it lately, but sustained no damage. It lies between the two upper shoots (No. 1 and 2), which are most used.

"I had the snag examined yesterday by a diver, who reports it to be about 3 feet in diameter. The butt is buried under the stones forming the protective wall; the balance, outside the pile, projects into the river about 20 feet (20), and immediately under ships' bottoms. Ten feet of this is the trunk or barrel of the tree, the rest a branch or limb. The trunk touches one of the piles of the staiths, and lies so close to the bottom as to be embedded half its diameter in the gravel, causing slinging to be difficult, if it were any use. But I think it would be unwise to attempt raising it by lifting upward, as the chances are that, if it did rise, a large number of the stones would be dislodged, with every chance of their rolling out, as the bottom is rather steep at the staiths. The diver reports two large stones nearly out to the end of tree already, and I have felt others when sounding at the staiths, thus shewing that they roll out fast enough themselves, without being molested. In any case, I think the chances of lifting the snag in this way would be very doubtful, except it broke; it must be a long way under the stones now. Consequently, I should like the marine engineer's opinion as to its removal.

"If the snag lay midway between the piles, which are some 14 feet apart, I think it could be cut or severed by small charges of dynamite, but I would not use it in this case without first getting Mr. Gorman's opinion. He is the person that travels for Nobel's Dynamite Company, and explains how to use it. I got much useful information from him (re dynamite) when snagging the river. I think he will recommend cutting the snag in question, about 2 feet or more outside the pile. I know how he does this.

"I think Mr. Gorman did a similar job at Hokitika, where the wharf had been built over a large snag, which gave the harbour authorities much trouble for many years.

"A diver, with his dress, could cut it off I dare say. My diver has no dress, neither does he understand its use, but simply undresses and goes down. I found him very useful when snagging the river.

"I have the honour to be, Sir,
"Your most obedient servant,
"S. A. LEECH, Harbour Master.
"The Secretary
"Marine Department, Wellington."

To this there was the following reply:—

"Marine Department, Wellington,
"9th February, 1882.

"Sir,—I have the honour to acknowledge the receipt of your letter of the 27th ultimo, with reference to a snag recently found at the coal staiths; and in reply, to inform you that this snag is not to be blasted, but that you are authorized to have the same cut off about 2 feet from the piles.

"I have the honour to be, Sir,
"Your obedient servant,
"H. S. McKELLAR, for Secretary.
"The Harbour Master, Westport."

On the 14th of February the harbour master again wrote as follows:—

"Harbour Office, Westport,
"14th February, 1882.

"Sir,—I have the honour to acknowledge the receipt of your letter M. 82/264, No. $\frac{770}{31}$, acknowledging receipt of mine, re snag at the coal staiths, authorizing me to have it cut off about 2 feet from the piles, as blasting is not permitted. In reply, I beg to state that I know of no way to cut it except by a diver going down and doing it. The diving dress that was here was returned to Wellington, where it was urgently required.

"I can see no other way of doing it except by putting the punts on it at low water. Should it rise with the tide, then, I fear, as already expressed in last letter, that the stones would get dislodged and rolled out under ships' bottoms. This would be bad. Certainly it might break off short about the pile, or just where it goes under the stones. If so, all would be right, and the danger would be removed; but my experience of snags is that they are very strong, and usually in a good state of preservation when under water. Consequently, I dread that heaving the punts down to this snag at low-water is fraught with much danger, for reasons already given, and that I cannot recommend it in consequence. However, whether it is decided to send the diver, or use the punts, I shall be glad to see something done as soon as possible towards removing this danger.

"S. A. Leech, Harbour Master.

"The Secretary
"Marine Department, Wellington."

No notice of danger was given until after the accident to the *Westport*, when the harbour master put up a notice on the piles, "Snag here, 11 feet 6 inches low-water springs."

On the 8th of May, 1882, a diver employed by the Public Works Department went down and found a horizontal snag about 40 feet long, projecting from the staith, the butt of the tree being underneath it. From 25 to 30 feet from the staith he came across the stump of a tree that had been felled, standing up vertically, and projecting about 18 inches above the horizontal snag, which was resting up against it. This was the snag which caused the damage to the *Westport*. If she had gone on the horizontal one, she would have forced it down, as there was 2 feet of water under it.

Their Lordships think that there was here evidence from which, if it was properly left to them, the jury might properly conclude that the Executive Government, by their servant the harbour-master, had, before this accident, notice of a danger at this spot, such as to make it a want of reasonable care in them not, by their servants, to inquire what that danger was, and to warn a vessel in the position of the plaintiff's vessel of the existence of danger there. If such a warning had been giving it would have been the fault of the plaintiff's servants if they let the vessel pass over that spot at low water. Their Lordships do not think it was necessary to go so far as to prove that the servants of the Government knew the precise nature of the danger, or whether the projecting snag was, as it turned out to be, an independent vertical snag, or as the harbour-master seems to have supposed, a branch or limb attached to the horizontal snag. The real question was, whether, if they had not neglected the duty which the law cast on them to take reasonable care, they would not have known of the existence of a danger against which they should give warning.

Their Lordships have felt much embarrassed from not being told what directions were given to the jury. It may be that there was some misdirection, or that the right point was not presented to the jury, and that is not shewn, and it lay on the appellants to shew it.

The findings of the jury on the 11th and 12th issues amount to a finding that there was negligent ignorance, and their Lordships are by no means prepared to say that there was not evidence upon which the jury might reasonably come to that conclusion. Even if such evidence had not existed, still there was evidence that the Executive Government had before the accident to the *Westport* sufficient notice of the danger to make it their duty to give warning of it, which was not done till after the accident. This was a breach of the duty to take reasonable care.

It remains to notice one other question which was raised by the counsel for the Appellant, namely, whether the negligence which occasioned the inquiry was within the provisions of the Crown Suits Act, 1881. Sect. 37 of that Act provides that,—

"No claim or demand shall be made upon or against Her Majesty, under this part of this Act, unless the same shall be founded upon or arise out of some one of the causes of action hereinafter mentioned, and for which cause of action a remedy would lie if the person against whom the same could be enforced were a subject of Her Majesty,—

"(1.) Breach of any contract entered into by or under the lawful authority of the Governor on behalf of Her Majesty, or of Her Majesty's Executive Government in the colony, whether such authority be express or implied.

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"(2.) A wrong or damage independent of contract, done or suffered by or under any such authority as aforesaid in, upon, or in connection with a public work as hereinafter defined.

"(3.) For the purposes of this provision 'public work' means any railway, tramway, road, bridge, electric telegraph, or other work of a like nature used by the Government of the colony, or constructed by such Government out of moneys appropriated by the General Assembly, and the revenues derived from which form part of the general revenue of the colony."

In *Jolliffe* v. *Wallasey Local Board* (1) it was held that an omission to do something which ought to be done in order to the complete performance of a duty imposed upon a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to "an act done or intended to be done" within the meaning of a clause requiring a notice of action, and their Lordships think that the negligence in this case to take reasonable care is a wrong done by or under the authority of the Executive Government. They also think that the staiths are "a work of a like nature" within the meaning of sub-sect. (3). Indeed, the staiths seem to be an adjunct to the railway which is used for carrying coals to be loaded on board the vessels in order to facilitate the loading, and, in the view their Lordships take of the case, the negligence is in connection with them. The Supreme Court say that their verdict might possibly not have been the same as that of the jury, but they could not say the finding was contrary to law. Their Lordships also might possibly not find the same verdict, but the question of negligence was one which the jury was to determine, and no sufficient ground has been shewn for setting aside their verdict. Their Lordships will therefore humbly advise Her Majesty to affirm the decision of the Supreme Court, and to dismiss the appeal, and the costs thereof will be paid by the appellant.

Solicitors for appellant: *J. & R. Gole.*
Solicitors for respondent: *Baker & Nairne.*

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(1) Law Rep. 9 C. P. 62.

Applied. THORPE *v.* FASEY. [1949] Ch. 649

[HOUSE OF LORDS.]

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1884
March 28.

THE MERSEY STEEL AND IRON CO. (LIMITED) . . . . APPELLANTS;

AND

NAYLOR, BENZON & CO. . . . . . . RESPONDENTS.

Sale of Goods—Contract for Delivery of Goods by Instalments—Contract, Rescission or Repudiation of—Company, Winding-up of—Set-off of unliquidated Damages against Claim of Company in Winding-up—Counter-claim—Judicature Act 1875 (38 & 39 *Vict. c.* 77) *s.* 10—*Order* XIX. *r.* 3.

The respondents bought from the appellant company 5000 tons of steel of the company's make, to be delivered 1000 tons monthly, commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of that month's instalment, and in the beginning of February made a further delivery. On the 2nd of February, shortly before payment for these deliveries became due, a petition was presented to wind up the company. The respondents bonâ fide, under the erroneous advice of their solicitor that they could not without leave of the Court safely pay pending the petition, objected to make the payments then due unless the company obtained the sanction of the Court, which they asked the company to obtain. On the 10th of February the company informed the respondents that they should consider the refusal to pay as a breach of contract, releasing the company from any further obligations. On the 15th of February an order was made to wind up the company by the Court. A correspondence ensued between the respondents and the liquidator, in which the respondents claimed damages for failure to deliver the January instalment, and a right to deduct those damages from any payments then due; and said that they always had been and still were ready to accept such deliveries and make such payments as ought to be accepted and made under the contract, subject to the right of set-off. The liquidator made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. The respondents counter-claimed for damages for breaches of contract for non-delivery:—

Held, affirming the decision of the Court of Appeal, that, upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery; that the respondents had not, by postponing payment under erroneous advice, acted so as to shew an intention to repudiate the contract, or so as to release the company from further performance.

That s. 10 of the Judicature Act, 1875, imported into the winding-up of companies the rules as to set-off in bankruptcy; that the respondents were entitled, after the winding-up order was made, to set off damages for non-delivery against the payments due from them, and to counter-claim for damages in this action.

APPEAL from an order (dated June 13, 1882) of the Court of Appeal (Jessel M.R. Lindley and Bowen L.JJ.) reversing an order of Lord Coleridge C.J. The facts are fully set out in the report of the decisions below (1). All the facts material to the present report are stated in the head-note. It may be added that the referee having found that the damages due to the defendants for non-delivery amounted to £1723, being in excess of the £1713 admitted to be due to the plaintiffs for the price of the steel delivered, the Court of Appeal by an order dated the 13th of April 1883 gave judgment for the defendants with costs. The plaintiffs appealed from this order also.

March 27, 28. *A. Cohen* Q.C. and *French* (*C. Russell* Q.C. with them) for the appellants:—

As to the first point, the rights of the parties upon the contract, the Court of Appeal did not apply the true principle for the determination of a case like the present. A contract of the kind now sued on is made on the assumption that the parcel already delivered will be paid for punctually and in time to put the manufacturer in funds to provide for the manufacture and delivery of the next parcel. If either party to such a contract breaks it in a material part the other is absolved from performing his part: *Hoare* v. *Rennie* (2); *Honck* v. *Muller* (3). Payment for one parcel is a condition precedent to the delivery of the next. If the purchaser is solvent he ought to pay: if insolvent it is unjust that he should have delivery; and the seller is justified in refusing to deliver: *Turnbull* v. *McLean* (4). The question which must be decided here was left open by Patteson J. in *Withers* v. *Reynolds* (5). The Court of Appeal proceeded on the ground that in order to set free the vendor the purchaser must evince an intention not to perform the rest of the contract. That cannot be; it is enough if one party refuses to perform any material part: in other words if the contract originally made is substantially different from the contract which the purchaser seeks to enforce upon the vendor. The law gives no damages or remedy for the breach of a contract to pay money: not even interest unless stipulated or recoverable under the statute: therefore the Courts should be slow to compel the vendor to deliver without payment. Up to the 15th of February the respondents declined to pay, under a mistaken notion that the appellants could not give a discharge: after that date they refused to pay because they claimed to deduct unliquidated damages: they had no right thus to take the law into their own hands. Though not so expressed, payment is implied as a condition precedent; see notes to *Pordage* v. *Cole* (1); *Graves* v. *Legg* (2); *Coddington* v. *Paleologo* (3); *Bradford* v. *Williams* (4), per Martin B. The rule in equity that time is not of the essence of the contract does not apply in mercantile contracts: *Reuter* v. *Sala* (5), per Cotton L.J. *Freeth* v. *Burr* (6) was wrongly decided; but if right is distinguishable.

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(1) 9 Q. B. D. 648.
(2) 5 H. & N. 19.
(3) 7 Q. B. D. 92.
(4) 1 Court Sess. Cas. (4th Ser.) 730.
(5) 2 B. & Ad. 882, 885.

As to the second point, the respondents had no right of set-off. Before the Judicature Act it will be admitted that there could be no set-off of unliquidated damages against a company being wound up, and the only question is whether s. 10 of the Judicature Act 1875, has the effect of importing into a winding-up the rules of set-off contained in s. 39 of the Bankruptcy Act 1869. There is no decision on the point except the one under appeal, but on principle the answer to that question should be in the negative. It has been held that s. 87 of the Bankruptcy Act 1869 is not imported into a winding-up: *In re Withernsea Brickworks* (7); nor s. 32: *In re Albion Steel and Wire Company* (8); nor s. 34: *Thomas* v. *Patent Lionite Company* (9). The more reasonable construction of s. 10 is that it imports only those portions of bankruptcy laws and rules which are expressly mentioned.

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(1) 1 Wms. Saund. 548 (ed. 1871).
(2) 9 Ex. 709.
(3) Law Rep. 2 Ex. 193.
(4) Law Rep. 7 Ex. 259.
(5) 4 C. P. D. 239, 249.
(6) Law Rep. 9 C. P. 208.
(7) 16 Ch. D. 337.
(8) 7 Ch. D. 547.
(9) 17 Ch. D. 250.

Sir *F. Herschell* S.G. (*Bigham* Q.C. with him) for the respondents, was directed to confine his argument to the question upon the right of set-off.

The bankruptcy rules as to set-off are clearly imported into a winding-up by the very words in s. 10, "the same rules shall prevail and be observed as to debts and liabilities provable as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." If the right of set-off is not imported a different "debt" will be provable in equity to that provable in bankruptcy. To this effect is the dictum of Bacon V.C. in *In re Compagnie Générale de Bellegarde* (1).

EARL OF SELBORNE L.C.:—

My Lords, in this case I will deal first with the last point which has been argued, and it appears to me that it lies within a very narrow compass. The Act of 1875 has said that for certain purposes "the same rules shall prevail and be observed" in winding up under the Companies Acts "as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt," and I cannot help pausing to observe upon what is a little remarkable in that enactment. It is not the rules that *were* in force when the Act of 1875 was passed, but the rules which "*may be* in force for the time being;" marking very strongly the principle on which the legislature in this enactment proceeded, namely, that they treated the cases as in pari materiâ, governed, as the former clearly are, by the same principles which govern the law of insolvency or bankruptcy; that it was safe not only to apply the then existing rules upon that subject but to apply them with any future addition or alteration which in legislation as to bankruptcy might be thought fit. That I think very distinctly confirms the weight which otherwise might be due to a consideration of the principle and reason of the enactment. But I do not think that any aid from that consideration is really necessary, because we find that among the rules which are to be imported from bankruptcy there are included the rules "as to debts and liabilities provable." Is not the rule in question one as to debts and liabilities provable? It occurs in that division of the Bankruptcy Act 1869 which is under the sub-heading, "Payment of debts and distribution of assets." The 1st section under that head is one which, following a series of earlier statutes, makes demands in the nature of unliquidated damages, arising by reason of contract, provable in bankruptcy, and similar demands which do not so arise and which are not of that nature not provable. The Act defines what are to be proved—all debts and liabilities and obligations except certain things which are excepted—there are two or three clauses dealing with special matters, and we then come to the 39th, which occurs under the same division of the statute. "Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, *and no more,* shall be claimed or paid on either side respectively." Your Lordships observe that it is not that it *may be*—it is not a thing which is optional, but it is a positive, absolute rule for the purpose of proof in bankruptcy, and nothing can be proved according to that rule in such cases except the balance of the account; that only is regarded as the claim which it is competent for the creditor to make when he comes in to prove under the bankruptcy. That being so, how is it possible to say that this is not a rule, both within the general spirit and intention of the section and within the express words "as to debts and liabilities provable"? I do not think it necessary to say more upon that subject.

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(1) 4 Ch. D. 475.

Upon the other point, I do not think it desirable to lay down larger rules than the case may require, or than former authorities may have laid down for my guidance, or to go into possible cases differing from the one with which we have to deal. I am content to take the rule as stated by Lord Coleridge in *Freeth* v. *Burr* (1), which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the

(1) Law Rep. 9 C. P. 208.

one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here. Before doing so, however, I must say one or two words in order to shew why I cannot adopt Mr. Cohen's argument, as far as it represented the payment by the respondents for the iron delivered as in this case a condition precedent, and coming within the rules of law applicable to conditions precedent. If it were so, of course there would be an end of the case; but to me it is plain beyond the possibility of controversy, that upon the proper construction of this contract it is not and cannot be a condition precedent. The contract is for the purchase of 5000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, "Delivery 1000 tons monthly commencing January next;" and as to the time of payment, "Payment nett cash within three days after receipt of shipping documents;" but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron, to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered steel.

But, quite consistently with that view, it appears to me, according to the authorities and according to sound reason and principle,

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that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is whether the facts here justify that conclusion? Now the facts relied upon, without reading all the evidence, are these. The company at the time when the money was about to become payable for the steel actually delivered fell into difficulties, and a petition was presented against them. There was a section in the Companies Act 1862, (sect. 153), which appeared to the advisers of the purchasers to admit of the construction, that until in those circumstances the petition was disposed of by an order for the company to be wound up or otherwise, there would be no one who could receive, and could give a good discharge for, the amount due. There is not, upon the letters and documents, the slightest ground for supposing either that the purchasers could not pay, or that they were unwilling to pay, the amount due; but they acted as they did, evidently bonâ fide, because they doubted, on the advice of their solicitor, whether that section of the Act, as long as the petition was pending, did not make it impossible for them to obtain the discharge to which they had an unquestionable right. And therefore the case which I put during the argument is analogous to that which according to the advice they received they supposed to exist, namely, the case of a man who has died between the delivery and the time when payment ought to be made, he being the only person to whom payment is due; and of course until there is a legal personal representative of that person no receipt can be given for the money. By the Act of Parliament, in the event of a winding-up order being made, it would date from the time when the petition was presented; and this clause, which no doubt, according to its true construction, only deals with alienations of the property of the company, was supposed by the solicitor of the purchasers to make it questionable whether the payment of a debt due to the company, to the persons who if there had been no petition would have had a right to receive it, might not be held, in the event of a winding-up order being made, to be a payment of the property of the company to a wrong person and therefore an alienation.

I cannot ascribe to their conduct, under these circumstances, the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract. It is just the reverse; the purchasers were desirous of fulfilling the contract; they were advised that there was a difficulty in the way, and they expressed anxiety that that difficulty should be as soon as possible removed, by means which were suggested to them, and which they pointed out to the solicitors of the company. The company evidently took up the attitude, in that state of things, of treating the default as one which released them from all further obligation. On the 10th of February, which was before the winding-up order was made, and while that state of things still continued, the company by their secretary wrote to say that they thought (being so far correct and thinking rightly) that the objection was not well founded in law; and they added, "We shall therefore consider your refusal to pay for the goods already delivered as a breach of contract on your part and as releasing us from any further obligations on our part." I think that they were wrong in that conclusion; and that there is no principle deducible from any of the authorities which supports that view of such—I hardly like to call it a refusal—of such a demur, such a delay or postponement, under those circumstances.

The company, until they were wound up, never receded from that position which they took up on the 10th of February 1881; and it appears to me to be clear that the liquidator adopted it, and never departed from it; and that the repudiation of the contract on insufficient grounds on the part of the company, which had taken place while the petition was pending and before the winding-up order was made, was adhered to after the winding-up order was made, on the part of the liquidator. On the other hand, it seems to me that, fairly and reasonably considered, the conduct of the respondents was justifiable. Upon the 17th of February 1881, after the making of the winding-up order, they state that there are instalments which ought to have been delivered but which have not been delivered, in respect of which they would have a claim for damages, and that they apprehend that they would have a right to deduct those damages from any payments then due from them; and, according to the view which has been taken in the Court of Appeal of the effect of the 10th section of the Act of 1875, and in which view I believe your Lordships agree, that was the right way of looking at the matter. Then the respondents go on to say, that they are prepared to accept all deliveries which the liquidator may make under the contract, and to pay everything due, only requesting that those payments may be considered as made upon this understanding, in substance, that the right to the set-off which exists in law for the damages shall not be prejudiced—a perfectly reasonable, defensible, and justifiable proposal. And the solicitor who writes the letter adds, "Or I think it probable that my clients would consent to accept delivery now and waive the damages," a thing which in a later letter they express their willingness to do. In my judgment, they have not in any portion of the proceeding acted so as to shew an intention to renounce or to repudiate the contract, or to fail in its performance on their part.

Therefore I think that the judgment of the Court below is right, and that this appeal should be dismissed with costs, and I so move your Lordships.

LORD BLACKBURN :—

My Lords, I am of the same opinion. On the effect of the 10th section of the Act of 1875, I will only say that I perfectly agree with what the Court below have said and with what has been said by the Lord Chancellor.

As to the first point, I myself have no doubt that *Withers* v. *Reynolds* (1) correctly lays down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, "If you go on and perform your side of the contract I will not perform mine" (in *Withers* v. *Reynolds* (1) it was, "You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you"), that in effect amounts to saying, "I will not perform the contract." In that case the other party may say, "You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract." That was settled in *Hochster* v. *De La Tour* (1) in the Queen's Bench and has never been doubted since; because there is a breach of the contract although the time indicated in the contract has not arrived.

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(1) 2 B. & Ad. 882.

That is the law as laid down in *Withers* v. *Reynolds* (2). That is, I will not say the only ground of defence, but a sufficient ground of defence. In *Freeth* v. *Burr* (3) it was also so laid down; and Lord Coleridge here thinks the facts were such as to bring the case within that principle. I will not at this time of the day go through them, but when the facts are looked at it is to me clear that that is not so. So far from the respondents saying that when the iron was brought in future they would not pay for it, they were always anxious to get it, and for a very good reason, that the price had risen high above the contract price. There was a statement that for reasons which they thought sufficient they were not willing to pay for the iron at present; and if that statement had been an absolute refusal to pay, saying, "Because we have power to do wrong we will refuse to pay the money that we ought to pay," I will not say that it might not have been evidence to go to the jury for them to say whether it would not amount to a refusal to go on with the contract in future, for a man might reasonably so consider it. But there is nothing of that kind here; it was a bonâ fide statement, and a very plausible statement. I will not say more. I refrain from weighing its value at this moment; but, as I said before, it prevents the case from coming within the authority of *Withers* v. *Reynolds* (2) and *Freeth* v. *Burr* (3), and consequently, as I understand it, Lord Coleridge made a mistake in the ground on which he went. The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage* v. *Cole* (4)), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct." But Mr. Cohen contended that whenever there was a breach of the contract at all (I think he hardly continued to contend that after a little while, but he said whenever there was a breach of a material part of the contract) it necessarily went to the root of the matter. I cannot agree with that at all. I quite agree that when there were a certain number of tons of the article delivered, it was a material part of the contract that the man was to pay, but it was not a part of the contract that went to the root of the consideration in the matter. There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason (if that would have made any difference), but it did not go to the root or essence of the contract, nor do I think that there is any sound principle upon which it could do so. I repeatedly asked Mr. Cohen whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority. There are many cases in which the breach may do so; it depends upon the construction of the contract. With regard to the case of *Hoare* v. *Rennie* (1) it has been said that the Chief Baron there went so far as to say that it was the essence and substance of the contract that the whole of the 166 tons of iron, and no less, should be delivered. If it was so, it would follow that when in the present case the January shipment had not been made, and the company could only deliver part of the quantity, it went to the essence of the contract. The question depends upon whether the whole and no less is the essence of it. And again in *Honck* v. *Muller* (2), which has been referred to, it is expressly and pointedly shewn that that was the ground taken, and the noble and learned Lord opposite (Lord Bramwell) stated that in his opinion the contract of the one party was to deliver and of the other to take 2000 tons of iron, and that inasmuch as it was to be by three instalments and the first was gone and there never could be more than

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(1) 2 E. & B. 678.

(2) 2 B. & Ad. 882.

(3) Law Rep. 9 C. P. 208.

(4) 1 Wms. Saund. 548 (ed. 1871).

(1) 5 H. & N. 19.

(2) 7 Q. B. D. 92.

two-thirds of the quantity, the thing bargained for being the whole quantity of iron and no less, the defendant was not bound to deliver two-thirds when the plaintiff required the two-thirds only. Supposing that that was the true construction of the contract, I think that that would be the right conclusion. The present Master of the Rolls seems, if I understand him rightly, to have thought that that was not the true construction of the contract —whether it was or not I do not express any opinion, except to point out that whatever be the construction of other contracts, there is not in my mind the slightest pretext for saying that such is the construction of this contract; and that being so, these cases have really no bearing upon the matter.

The circumstances being as I have said, the contract not being such as to make this payment a condition precedent, or to make punctual payment for one lot of iron which has been delivered a matter causing the contract to deliver other iron afterwards to be a dependent contract, being of opinion that that is not the meaning of the contract, I think that the decision of the Court of Appeal was right.

LORD WATSON:—

My Lords, I am of the same opinion. I think it would be impossible for your Lordships to sustain the appeal unless your Lordships are prepared to hold that any departure whatever from the terms of the contract by one of the parties must be sufficient to entitle the other to set it aside. I think the correspondence shews that the delay in making payment of that part of the contract price which ought to have been paid on the 5th of February, was due to these two causes; in the first place, a very natural desire on the part of the purchasers to see that they were safe against being called upon to make second payment of the price, and in the second place an obvious desire on the part of the sellers to get rid of the contract altogether. There was no controversy as to the terms of the contract. There was no unwillingness on the part of the respondents to pay the price due under the contract, except for the circumstance that there had been a change in the constitution of the company, because they had gone into liquidation on the 2nd of February, and the respondents' firm were advised by their law agent that they were not in safety to pay until the liquidator was appointed.

That brings us down to the 15th of February. At that date this had taken place, the company had given notice on the 10th of February of their resolution to repudiate the contract in consequence of the failure of the respondents to pay, and to that repudiation the liquidator I think consistently adhered. In these circumstances it appears to me that the judgment appealed from must be affirmed.

LORD BRAMWELL:—

My Lords, I am of the same opinion, and shall say but very few words. My Lord Coleridge says that the defendants, the now respondents, positively refused to pay for the iron already delivered, and for all which might be subsequently delivered. Now whether, if they had positively refused to pay for that already delivered, it would have given any justification to the company or the liquidator for refusing to go on with the contract, it is not necessary for me to say at the present moment. I do not say that it would not; but if they had positively refused to pay for all which might be subsequently delivered, it would undoubtedly be an answer upon the authority of *Withers* v. *Reynolds* (1), and the reasoning which you have heard. But I really cannot, with great submission to the noble Lord, find any evidence of that, and Mr. Cohen certainly did not attempt to prove it: but he set up a new ground, which was that the payment of the debt due was a condition precedent to the further performance of the agreement, with which I cannot at all agree.

I have just one other word to say. I cannot tell why *Honck* v. *Muller* (2) and *Hoare* v. *Rennie* (3) should be brought forward upon this occasion. I do not think that I said in *Honck* v. *Muller* (2) what Sir George Jessel (4) supposed me to have said, namely that "in no case where the contract has been part performed could one party rely on the refusal of the other to go on." If I did say so I recall it, because I do not think so; it depends on the nature of the contract and the circumstances of the case.

(1) 2 B. & Ad. 882.
(2) 7 Q. B. D. 92.
(3) 5 H. & N. 19.
(4) 9 Q. B. D. 658.

What I was busy upon in that case was in shewing that there had been no performance at all there, and that in truth what the plaintiff was seeking to do was to make the defendant accept the performance of something entirely different from what had been agreed upon, and I think in that opinion I was right. But what has that to do with this case? Suppose I was wrong, what then? Suppose *Honck* v. *Muller* (1) was wrongly decided, how does it bear upon this case? Not in the least. Nor indeed does the case of *Hoare* v. *Rennie* (2), which, in my opinion, was decided upon the considerations which I have mentioned and which I think should be supported.

LORD FITZGERALD:—

My Lords, I concur.

Orders appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 28th March 1884.

Solicitors for appellant: *W. W. Wynne & Son for Simpson & North, Liverpool.*

Solicitor for respondents: *Clements.*

(1) 7 Q. B. D. 92. (2) 5 H. & N. 19.

[HOUSE OF LORDS.]

H. L. (E.)
1884
April 3.

ARTHUR HILL . . . . APPELLANT;

AND

THE EAST AND WEST INDIA DOCK COMPANY . . . . RESPONDENTS.

Bankruptcy—Disclaimer of Lease by Trustee on Bankruptcy of Assignee of Lease—Liability of Lessor after Disclaimer—Bankruptcy Act 1869 (32 & 33 *Vict. c.* 71) *s.* 23.

The assignee of a lease for a term of years became bankrupt, and his trustee by leave of the Court disclaimed under sect. 23 of the Bankruptcy Act 1869 (32 & 33 Vict. c. 71) all the bankrupt's property and interest in the premises. The lessor having brought an action against the original lessee upon his covenant to pay rent for the rent accrued due since the appointment of the trustee:—

Held, affirming the decision of the Court of Appeal, by Earl Cairns and Lords Blackburn and Watson, Lord Bramwell dissenting, that notwithstanding the disclaimer the lessee remained liable upon his covenant.

APPEAL from an order of the Court of Appeal (Lord Selborne L.C. Jessel M.R. and Cotton L.J.) affirming an order of Hall V.C. which overruled a demurrer to a statement of claim in an action by the respondents against the appellant (1).

The statement of claim contained the following allegations:—

By deed dated the 2nd of December 1875 the respondents demised a public-house and other property at Blackwall to the appellant for a term of twenty-one years from the 25th of March 1875 at the annual rent of £300 payable quarterly on the usual quarter days in every year, and a proportionate part in the event of the term being determined by re-entry; and subject to certain covenants on the lessee's part. Among them was a covenant that the "lessee his executors administrators and assigns will pay unto the lessors their successors or assigns the said rent hereinbefore reserved on the days and times and in manner hereinbefore appointed for payment thereof clear of all deductions;" and a covenant not to assign without the previous consent of the lessors in writing.

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(1) 22 Ch. D. 14.

The lease (which was to be referred to upon the argument of the demurrer) was upon the express condition that if and whenever the lessee his executors administrators or assigns should (inter alia) assign the premises without the lessors' previous licence, or become bankrupt or make any composition with creditors, or there should be a breach of any of the lessee's covenants, the lessors might re-enter and thereupon the term of twenty-one years should absolutely determine.

By a deed of even date but executed after it, in consideration of £1150 paid to him by Clarke, the appellant assigned the premises for all the unexpired residue of the term to Clarke, who covenanted with the appellant in the usual form to pay the rent and observe the covenants of the original lease, and to indemnify the appellant against the payment of the rent and performance of the covenants. The assignment was made with the licence in writing of the respondents, but the licence provided that it should not release or prejudice the liability of the appellant from or to the payment of the rent and the performance of the covenants.

On the 3rd of December 1875 Clarke demised the premises to Truman, Hanbury and Buxton & Co. for the residue of the term of twenty-one years except the last three days thereof, by way of mortgage to secure the repayment of £1000 advanced by them to him. The mortgagees never accepted or took possession of the premises.

On the 10th of February 1881 Clarke filed his petition in the London Bankruptcy Court for liquidation and a trustee was shortly afterwards appointed.

On the 12th of March 1881 the appellant gave notice to the trustee requiring him to decide whether he would disclaim the property comprised in the lease. The trustee then applied to the Court for leave to disclaim the debtor's interest in the lease (1). Notice of the application was served on the appellant, on the mortgagees, and on the respondents. The respondents opposed the application on the ground that the effect of the disclaimer might be held to be to destroy the lease and to deprive them of their remedies against the appellant upon his covenants; but they offered to undertake not to sue the trustee on the covenants and not to make any claim in respect of them on the debtor's estate. The mortgagees also opposed the application upon the ground that the disclaimer would destroy their underlease.

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(1) See *Ex parte East and West India Dock Co.*, 17 Ch. D. 759.

The Registrar in Bankruptcy who heard the application by an order dated the 7th of May 1881 gave leave to the trustee to disclaim the debtor's property and interest in the leasehold premises. The respondents appealed to the Court of Appeal, but by an order dated the 30th of June 1881 the appeal was dismissed with costs.

The trustee pursuant to those orders by writing under his hand disclaimed all the property and interest of Clarke in the leasehold premises.

The respondents had not re-entered upon or resumed possession of the premises or any part thereof or accepted any other tenant.

The appellant never was in actual possession of the premises but was not kept out of possession or evicted by the respondents.

The respondents claimed £225, being the rent accrued on the 25th of March, 24th of June, and 29th of September 1881.

The appellant demurred to so much of the claim as claimed rent for the period subsequent to the appointment of the trustee.

March 25, April 3. *W. Pearson* Q.C. and *MacSwinney*, for the appellant:—

The effect of the disclaimer under sect. 23 of the Bankruptcy Act 1869 was to destroy the term and all its incidents: to work that which is equivalent to a surrender in fact and law: one of the consequences being that the lessor cannot sue for rent. Sect. 23 says that "in no case shall any estate or interest therein remain in the bankrupt:" Then what becomes of the term? If the respondents are right the appellant is liable for the rent and yet has not the term nor any means of getting it. Before 49 Geo. 3 c. 121 s. 119 the bankrupt, if lessee, remained liable: if assignee, and his assignees in bankruptcy accepted the lease he ceased to be liable. That statute and 6 Geo. 4 c. 16 s. 75, dealt only with the liability of the bankrupt, and not with the term itself; see *Inglis* v. *Macdougall* (1); *Taylor* v. *Young* (2);

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(1) 1 J. B. Moore, C. P. Rep. 196.

(2) 3 B. & Ald. 521.

Manning v. *Flight* (1); and *Tuck* v. *Fyson* (2). And so as to 12 & 13 Vict. c. 106 s. 145. The Act of 1869 expressly deals with the term. Under the statutes prior to 1849 a lease did not pass to the assignee in bankruptcy unless he elected to take it. Under the Act of 1849 election was perhaps not necessary, and under the Act of 1869 if the trustee does not disclaim the lease vests in him in common with all the bankrupt's property under sects. 17, 22, whether he accepts it or not: *Wilson* v. *Wallani* (3), where the cases under the old law are examined. *Smyth* v. *North* (4) is not against the appellant, for there the rent had wholly accrued before the disclaimer, and the dicta of Martin and Pigott B.B. were unnecessary. In *Ex parte Stephens* (5) James L.J. said that by the joint operation of the disclaimer and the Act the term was to be deemed "for all purposes" to have come to an end on the day of the adjudication: the term "was gone." To the same effect are *Ex parte Brook* (6); *Ex parte Glegg* (7); and *Taylor* v. *Gillott* (8). On disclaimer a freehold escheats to the Crown, per Jessel M.R.: *In re Mercer & Moore* (9). "Any other species of property" reverts to the person entitled on the determination of the bankrupt's estate. A lease either reverts to the lessor and is merged or is annihilated: in either case the lessee is exonerated. The words "be deemed to have been surrendered" may mean "be adjudicated," or may have reference to the prior date at which it is to be deemed to have been surrendered. Some such word was necessary since there is not to be an actual surrender. "Surrender" imports acceptance by the lessor. The statute should be construed literally; there are words expressly saving the rights and liabilities of third parties, such as are inserted in the corresponding section of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52) s. 55 sub-ss. 2, 6. A later Act may be looked at to interpret an earlier; per Willes J. in *Grill* v. *General Iron Screw Collier Company* (10); and a comparison of these two Acts shews that the earlier did not intend to limit the effect of a disclaimer in the way intended by the later. *O'Farrell* v. *Stephenson* (1) and *Smalley* v. *Hardinge* (2) were cases of sub-lease and bankruptcy of the lessee, and do not touch the present case. The principle laid down in *In re Wilson* (3); *Ex parte Walton* (4); and *Ex parte East and West India Dock Company, In re Clarke* (5) (this very bankruptcy) is that in considering whether leave to disclaim should be given the Court will exercise a discretion, but the interest of the bankrupt is to be the guide, whatever may be the consequence to third persons. So far as *Ex parte Walton* (4) is against the appellant it is wrong; and it is inconsistent with the decision of *In re Woods* (6); James L.J. being a party to both. *Harding* v. *Preece* (7) only follows the decision now under appeal.

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(1) 3 B. & Ad. 211.
(2) 6 Bing. 321.
(3) 5 Ex. D. 155.
(4) Law Rep. 7 Ex. 242.
(5) 7 Ch. D. 127, 130.
(6) 10 Ch. D. 100, 110.
(7) 19 Ch. D. 7.
(8) Law Rep. 20 Eq. 682.
(9) 14 Ch. D. 287.
(10) Law Rep. 1 C. P. 600, 611.

The appellant's contention involves no hardship or injury; the lessors can re-enter under the clause for forfeiture in case of bankruptcy, and the lessee and assignee took with knowledge of that clause. The object of the present Act was under circumstances like the present to merge the lease in the inheritance. It is much less hardship for the lessors to prove for damages against the bankrupt's estate, than for the lessee; for his damages are large: the lessors' may be nothing, for they can get back their property under the forfeiture clause.

A. Kekewich Q.C. and *W. Latham* for the respondents:—

The argument for the respondents is based upon and contained in the decision in *Ex parte Walton* (4), the judgments in which case deal with every difficulty, and it is sufficient to refer to them. A lease is a contract between lessor and lessee (Bac. Abr. tit. Leases), and there is a covenant to pay rent for so many years, not necessarily during the subsistence of the term. The covenant is quite independent of the term. The appellant's contention as to the vesting of the bankrupt's property is unfounded. The vesting clause does not take effect if the trustee does not accept. That was so even under 5 Geo. 4 c. 98 ss. 61 and 73, where there was a vesting clause. In the Act of 1869 the section which relieves the bankrupt from liability is sect. 49, not sect. 23, which was passed to prevent the bankrupt from holding property without paying for it. The lessor for whose benefit sect. 23 was inserted need not take advantage of it and insist upon forfeiture or surrender unless he pleases.

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(1) Ir. L. R. 4 C. L. 715.
(2) 7 Q. B. D. 524.
(3) Law Rep. 13 Eq. 186.
(4) 17 Ch. D. 746.
(5) 17 Ch. D. 759.
(6) 3 Ch. D. 459.
(7) 9 Q. B. D. 281.

W. Pearson Q.C. replied.

EARL CAIRNS:—

My Lords, this case raises a question of considerable difficulty, upon the construction of the 23rd section of the Bankruptcy Act of 1869. That section for the future has no existence, having been repealed by the Statute of last year, which has substituted an enactment of a very different and much more explicit kind upon this part of the bankruptcy law. The question which is raised by this appeal is one which at all events in this country cannot therefore very well occur again, and it is not likely that any other question of the same sort remains over or open for decision.

The way in which the present appellant raises the question is shortly this. There was a lease of a public-house made to him by the East and West India Dock Company in the year 1875, it was a lease for twenty-one years at a rent of £300 a year; and it appears that at the same time that this lease was made he made an arrangement with a person of the name of Clarke to assign the lease to him in consideration of a premium of £1150 to be paid by Clarke to him, and he took from Clarke a covenant to indemnify him against the rent and the covenants of that lease, under which he of course remained liable to the East and West India Dock Company. Before, however, this assignment was made it was necessary for him to obtain the consent of the lessors, the East and West India Dock Company, for the original lease contained a proviso that there should be no assignment without their consent. He applied therefore to the lessors for their consent, and they gave it, but accompanied it with the stipulation that their consent to this assignment to Clarke should not in any way alter or affect the liability of the present appellant to them for the rent and upon the covenants. They were satisfied with him as a solvent tenant, and they did not wish to have that security infringed upon.

Notwithstanding that state of things, Clarke having now become a bankrupt, and the trustee under the bankruptcy of Clarke having disclaimed the lease, which he was entitled to do, it being an onerous lease, the present appellant contends that the effect of the 23rd section of the Bankruptcy Act is this, that not only have the trustee of the bankrupt and the bankrupt himself been delivered from the obligations of that lease, but that the lease is to all intents and purposes destroyed and put an end to, and that notwithstanding his original responsibility to the lessors for the rent and the other covenants he is now perfectly free, and that the lessors have no recourse against him either for the rent or upon the covenants. Well, of course that may be so, an Act of Parliament may have stepped in and produced consequences of that kind; but it is obvious at the outset that if we find in an Act of Parliament a provision of that kind in words which cannot be interpreted otherwise, it is a very strong provision, and it is difficult to see upon what principle it can have been enacted by Parliament —although Parliament has the power to enact it—that a solvent man who has entered, with his eyes open, into a covenant with the owners of property to pay rent to them and to be liable to them for that rent and for other covenants, and who upon an assignment has recognised that liability and has stipulated that it shall continue, shall nevertheless be delivered from that liability, not by reason of anything which has passed between him and the lessors, but from a misfortune which has happened to the lessors, namely that the person to whom the lease has been assigned has become a bankrupt.

It is said that the 23rd section of the Act of 1869 produces this result, and I admit freely that the section seems to me capable of that construction. No doubt if you read it literally it does seem to provide that, "When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants," (I pass over some words which are unimportant) "the trustee may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall," "if the same is a lease, be deemed to have been surrendered on the same date"—"the date of the order of adjudication." It says, "shall be deemed to have been surrendered," it does not say "shall be surrendered," but there shall be a statutory fiction gone through, the result of which is that the lease shall be deemed to have been surrendered on that date. It is possible that that may mean that to all intents and purposes, as between all persons, persons actually concerned in the bankruptcy and those not so concerned, it shall be a surrendered lease and shall be altogether out of the case. But on the other hand is that the only interpretation? For that purpose your Lordships, I think, must consider what the object of this provision is. Why is it that there is this statutory fiction introduced? The section obviously is not one which has been prepared with much care or skill, or which shews indeed that the persons who were preparing it had fully present to their minds the various cases with which they had to deal. But is this necessarily the only construction of which the Act admits? I say that we must look to what the purpose is. Now I take it that the purpose of this section, and indeed the purpose of the whole statute, is in the first place to clear and discharge the bankrupt in cases where it is proper that *he* should be discharged from liability; in the next place to facilitate as early as possible the distribution of the property which is to be divided among the creditors and the winding up of the bankruptcy; and in the third place, to protect the trustee from any liability to which he might be subject and to which he ought not to be subject beyond what is necessary for the purpose of accomplishing the two prior objects. If therefore the statute can admit of any construction limited to these particular objects, we must consider whether that is not a construction preferable to the first to which I have referred. The first construction requires us, if the section is taken literally, to do that for which there is no motive, and as to which there can be no explanation given, that is to say, to destroy the rights and property of third persons, without accomplishing any beneficial object whatever for the purpose of the bankruptcy.

It appears to me that as between these two constructions the balance is stated most fairly and most pointedly by James, L.J.

in one of the cases to which we have been referred. In *Ex parte Walton* (1), James L.J. says this:—"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. Now the bankruptcy law is a special law, having for its object the distribution of an insolvent's assets equitably amongst his creditors and persons to whom he is under liability, and upon this cessio bonorum to release him under certain conditions from future liability in respect of his debts and obligations. That being the sole object of the statute, it appears to me to be legitimate to say that when the statute says that a lease which was never surrendered in fact (a true surrender requiring the consent of both parties, the one giving up and the other taking) is to be deemed to have been surrendered, it must be understood as saying so with the following qualification, which is absolutely necessary to prevent the most grievous injustice, and the most revolting absurdity—'shall, as between the lessor on the one hand and the bankrupt, his trustee and estate, on the other hand, be deemed to have been surrendered.'"

It appears to me that both of those constructions to which I have referred, the construction contended for by the appellant and the construction placed upon the section by James L.J., are possible constructions; and where there are two constructions, the one of which will do, as it seems to me, great and unnecessary injustice, and the other of which will avoid that injustice, and will keep exactly within the purpose for which the statute was passed, it is the bounden duty of the Court to adopt the second and not to adopt the first of those constructions.

I think that that would have been the conclusion at which I should have arrived if the matter had been new. But the matter is not new. This statute was passed in 1869; there have been, not a great number, but a substantial number of decisions upon it, beginning with the case of *Smyth* v. *North* (2), and coming down to the last of the cases which have been referred to in the argument. Those decisions, so far as they are decisions (I mean the decisions in those cases where there was an actual decision), are all on one side. There is no decision which favours the construction put upon this section of the statute by the appellant, the decisions are all the other way; and your Lordships have here a very learned judge, the late Vice-Chancellor Hall, and three learned judges of the Court of Appeal, all concurring, taking the same view, and holding themselves bound by those decisions. I think it would be a very strong and a very violent thing in construing a section of this sort, which deals with property that upon every bankruptcy to a greater or less extent changes hands, and with respect to which section in scores of cases which have not come into Court at all the decisions which the Court has arrived at in other cases have, no doubt, been followed,—it would, I say, be a very strange and violent thing if without the very strongest reasons your Lordships were now to alter that course of decision and to say that in all the cases which have been decided and all the cases where the parties have acted upon the authority of those decisions, although without any decision in their own particular cases, there has been done that which has been wrong and which ought to be undone. That has not, I think, been a course which this House has pursued, and certainly I should not recommend your Lordships to pursue it.

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(1) 17 Ch. D. 756.

(2) Law Rep. 7 Ex. 242.

Therefore for these reasons, which I have shortly given, I advise your Lordships in this case to affirm the decision of the Court of Appeal and to dismiss the appeal with costs.

LORD BLACKBURN:—

My Lords, I am of the same opinion. I think the whole question depends upon the true construction of this 23rd section of which we have heard so much, and I quite agree that whenever the Legislature (who have perfect and absolute power to enact what they please) have trusted the drawing of their Act to some one who uses words which, to say the least, are very obscure, there must be a risk of some difference of opinion as to their construction. In this particular case the construction which has been put upon the section by the appellant, namely that the words "shall be deemed to have been surrendered," used in their context and in the way which they are used, amount to saying "shall be to all intents and purposes as if it had actually been so," is a construction which I am not prepared to say is the natural and ordinary sense of the words, but it certainly is a construction which the words might bear. The other construction which has been put upon them is one which the words, in my opinion, would rather more reasonably bear of the two, namely that the case is to be deemed to have been surrendered so far as is necessary to effectuate the purposes of the Act.

That being so, the question which is really raised is, how are the words to be construed in the Act as it stands? I think that it is a question of very considerable difficulty; but, in delivering my judgment, I am myself relieved from that difficulty, because the late Lord Justice James in *Ex parte Walton* (1), expressed in better words than I could select (they have been read by the noble and learned Earl now on the woolsack) exactly what I conceive to be the ratio decidendi. I think the words here "shall be deemed to have been surrendered" (and a similar observation of course applies to the other expression of the same kind, "shall be deemed to be determined") mean, shall be surrendered so far as is necessary to effectuate the purposes of the Act and no further; and I think that to give them the sense which the learned counsel for the appellant contend for would be to go far beyond the purposes of the Act, and to work a cruel hardship upon persons in the position of the present lessors the East and West India Dock Company, and on all persons who have a solvent security for their rent (in this case for a period of twenty-one years), in consequence of there having been an assignment of the lease, as is pointed out by James L.J. in the case to which I have referred. If the assignee had died insolvent, leaving no assets, and consequently no one would have taken out administration, there would have been no doubt that the East and West India Dock Company could have had recourse against Mr. Hill to make him pay the rent so long as the lease continued. If the appellant's construction is a sound one, any Act which was passed for the purpose of relieving a trustee from the liability (whether he has or has not incurred it does not appear to me to be very material, but at all events he is entitled now to get rid of it) and for the purpose of relieving a bankrupt from the liability which he is under, would be enacted for no purpose at all that I can see if it is to relieve Mr. Hill from the liability which he has incurred, to the serious and great loss of the East and West India Dock Company, who thus lose their security for no purpose or object whatever. Of course the legislature might have enacted that; but entertaining the opinion that the construction put upon the section by the late Lord Justice James is, if anything, more natural and more reasonable and more correct than the construction for which the appellant contends, I certainly think it right to give effect to that construction.

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(1) 17 Ch. D. 756.

I have not based my opinion at all upon the fact of there having been such a continued course of proceeding that it would be right, upon the ground of what I may call the maxim "communis error facit jus," to adhere to it. I quite agree that the principle is a very sound one that where the law has been regarded as settled for a considerable time it ought to be adhered to; but I doubt whether this case is one where that principle would apply. However, on the other ground I have no doubt whatever that the judgment of the Court below is right and should be affirmed.

LORD WATSON:—

My Lords, I am of the same opinion and for the same reasons, which I need not detain your Lordships by repeating.

LORD BRAMWELL:—

My Lords, I said to the noble and learned Lord on the woolsack, who was kind enough to ask me if I desired time to prepare a judgment, that I really did not think it worth while to inconvenience your Lordships and to put the parties to the expense of coming here again, and that I would say now as well as I could what I wished to say in this matter, though I confess otherwise I should have been glad to have had an opportunity of putting into a better shape than I can at the present moment my view upon the question.

Let me say at once that I abide by the opinion that I expressed in the case of *Smyth* v. *North* (1), but, at the same time, I frankly own that if I had to advise anybody as to whether my opinion should be acted upon or the opinion of the noble and learned Lords who have addressed your Lordships, I should say undoubtedly the weight of authority is so against me that I must somehow or other be in the wrong, though I cannot see it.

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(1) Law Rep. 7 Ex. 242.

Now in the first place, I think it is important to ascertain what is the meaning of this provision about disclaimer; and having heard no reason to the contrary, but a very good reason from Mr. Latham for abiding by my opinion, it does seem to me that property does not vest in the trustee until he has done some act to accept it and that, consequently, a disclaimer is a necessary thing only where he would be held to have accepted, but for the power of disclaiming. I come to that conclusion for several reasons, which I will state very briefly. One is, that it was undoubtedly the law, when there was an actual assignment of the bankrupt's property made to the assignee of the bankrupt, thence so called, that it did not vest in him unless he chose to take it. Another is, that the expression used in this unhappy section 23 is, that he may disclaim *notwithstanding that he has done something* which would be evidence of his having accepted. And my third reason is that I cannot suppose that the legislature (although I am capable of supposing nearly anything with respect to this particular Act of Parliament) intended that every trumpery matter should be a subject of disclaimer; and there must be an infinity of small contracts which would, in a sense, vest in the trustee, if he chose to accept them. I cannot think it would be necessary that in every case he should be put to the trouble and expense of making a serious disclaimer.

Now, it may be said, What has that to do with the matter in hand? Why, in the first place, it seems to have been very much the basis of the judgment of the late Master of the Rolls; and I cannot help thinking that if it were investigated it would be found to have some bearing upon this matter; because, supposing the trustee were to say, "I shall not accept the lease and I shall not disclaim," what would be then the condition of the bankrupt? I believe that a bankrupt lessee or a bankrupt assignee of the lease would be as much discharged from the covenants and obligations in the lease as he would from any other debt; but the lease would continue in existence; and I should like very much to see what effect and operation (if it were worth while to go into it now) that would have upon the question before us. It may very fairly be said, as I think I put it in the course of the argument, that if in that case the lease subsists, as it undoubtedly would subsist, and if the original lessee is liable, why should the trustee, by doing what, in many cases, would be an act of supererogation, discharge him and effect this compulsory surrender? I therefore think if one had time to go into it, it would be really worth inquiring into in order to ascertain what would be the effect upon the lessee and upon the assignee of the lease, if, as I say, it does not vest in the trustee and if he did not think fit to disclaim. However I am not able now to go into it, for I do not at present remember enough of the matter to be able to do so (1).

(1) Note by LORD BRAMWELL.—I have examined into this matter. It is not necessary to go further back than 6 Geo. 4 c. 16. By that, as by prior Acts, assignments of bankrupts' property were to be made to their assignees, whence their name. It is certain that this vested no property in the assignees unless they *elected* to take it: *Hanson* v. *Stevenson* (1 B. & Ald. 303), *Turner* v. *Richardson* (7 East, 335), and many other cases. Those I have cited by name were before Geo. 4, but were decided on similar language in former Acts. By 1 & 2 Will. 4 c. 56, an Act for establishing a Court of Bankruptcy, it was enacted by sect. 25 that the bankrupt's personal estate should vest in the assignees by virtue of their appointment without a deed of assignment; and by sect. 26 that such real estate of the bankrupt as was by 6 Geo. 4 c. 16 directed to be conveyed by the commissioners to the assignees, should vest in the assignees by virtue of their appointment without a deed of conveyance.

This of course did not alter the law that no property passed to the assignees except what they elected to take. By 12 & 13 Vict. c. 106 s. 141 the bankrupt's personalty was vested in the assignees by virtue of their appointment. By sect. 142, real estate vested in them by virtue of their appointment "without any deed of conveyance." And by sect. 145, provision was made for the case of where they "elect to take a lease." It is obvious that under this last Act no property vested except what the assignee elected to take. For the reasons I gave in delivering my opinion in the principal case, I say no alteration of this state of things was made by the Act of 1869. The only argument I see to the contrary is this: In the 12 & 13 Vict. c. 106, provision was made for some of the cases where the bankrupt was possessed of a lease. And no provision is made for any such case in the Act of 1869, though the Act of 12 & 13 Vict. is repealed by another Act of 1869, c. 83. The result was that no provision was made in the bankrupt law, as it stood on the Act of 1869, in relation to leases to which the bankrupt was entitled, unless it is the pro-

Though the Act 32 & 33 Vict. c. 71, does not itself repeal former bankruptcy Acts, they are repealed by another Act of the

vision about disclaimer and surrender. But without going into it at length now, it seems clear that that ought not to have been held to alter the former law and the otherwise natural meaning of the Act of 1869 as to property not vesting unless the trustee elected to take it, and that the right way to treat the matter is to suppose that the case of the bankrupt having a lease (except as provided for by the power of disclaimer) was omitted either through the very probable ignorance of the draftsman or intentionally. It may be, indeed, that he thought he had made sufficient provision by providing for the disclaimer and surrender which he thought would include all leases. That would justify my opinion in the principal case. What the statute of last session means I will not attempt to say. Whether that all leases shall vest till disclaimed or not, whichever it may be, I still hold that property of the bankrupt did not pass to the trustee by the Act of 1869 unless he elected to take it. I must repeat the regret I expressed when the bill of last session was in the House, that an opportunity had not been given of discussing and, I believe, of improving it.

But now with a view not of discussing the question decided in the principal case, but to see whether the property vested under the Act of 1869 in the trustee without election, it is important to see what became of the lease before and after the Act of 1869. By 12 & 13 Vict. c. 106 s. 145, provision was made as to the case of a bankrupt "having or being entitled to any lease," which was intended to meet, but which, by a fatality that attends Bankruptcy Acts, did not meet all cases. If the assignees elected to take the lease, the bankrupt was free from future liability to rent and covenants. This, doubtless, comprehended the cases of when he was lessee and when he was assignee of a lease. If on being required (not saying by whom) the assignees would not elect whether they would accept or decline such lease, any person having so leased, or any one claiming under him, might apply to the Court, and the Court might order them (i.e. the assignees) "to elect and deliver up the lease in case they shall decline the same, and possession of the premises"—which possession they might not have. This also would seem to comprehend the case of the bankrupt being a lessee or assignee of a lease—though *Flight* v. *Manning*, to which I shall have to refer more particulary, seems otherwise. This power of making the assignees elect was limited to the lessor, no provision was made for the case where he did not call on them to elect, and he certainly might purposely abstain from so doing. The same section contained a further provision that if the assignees elected not to take, "the bankrupt shall not be liable if" "he shall deliver up the lease to the person then entitled to the rent, or having agreed to convey or lease." I think this, though blunderingly expressed, means the lessor or his assignee. This also would seem to include the case of a bankrupt lessee or assignee of a lease. But in *Manning* v. *Flight* (3 B. & Ad. 211) it was held that under similar words in 6 Geo. 4 c. 16, the case of a bankrupt assignee of a lease was not included, at least that the original lessee was liable on his covenant. How that could be, with submission, if the lessor had the same session (32 & 33 Vict. c. 83). There is therefore nothing which goes to shew that if the trustee did not take to the lease the lease would not be in existence or would be in any way

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lease and possession of the property I cannot see. It is in a way an authority for the decision in the principal case—which, however, I am not now discussing. But it seems clear on that section that if the assignees elected not to take and the bankrupt did not give up the lease, it continued, and he and all others remained liable on its covenants. And why not? The lease might be valuable to him though not to sell, and the landlord might be content with him though bankrupt, the rent being sufficient, and there being the power of distress. And why should not that be the case under the Act of 1869, when the trustee does not disclaim? It may be said that if so a bankrupt lessee could not get freed from a burdensome lease by his bankruptcy, and so would not be a free man. That seems so, but it only shews another blunder in the Act of 1869. What is the provision for this in the Act of last session I will not attempt to say. I will merely remark that the proviso to sub-sect. 6 of sect. 55 would not apply to a lessee when the assignee of the lease had become bankrupt. It is noticeable, however, that it gives a great benefit to landlords, doubtless from a sense of their use to the public. Why should a sub-lessee or mortgagee bear the loss occasioned by a lessee's bankruptcy? Why not the landlord?

It may be asked, if the lease not being disclaimed by the trustee under the Act of 1869 continued in existence, who was to pay the rent? The same question might be asked as to 12 & 13 Vict. c. 106 s. 145 when there was no power of disclaimer. And here an argument is furnished by that section, as interpreted in the case of *Manning* v. *Flight* (3 B. & Ad. 211). May it not have been to avoid this "absurdity" that the legislature enacted that the disclaimer should be a surrender? By the Act of 1869, sect. 34, a year's rent may be distrained for after the bankruptcy, but suppose further rent becomes due, whether before or after disclaimer, if the lease is not surrendered except as between lessor and bankrupt, that may be distrained for. Can that be so? Sect. 35 supposes not, for it says that proof may be made of "a proportionate part of such rent up to the day of the adjudication as if it grew due from day to day." Under sect. 55 of the Act of last session a trustee may disclaim at any time within two months after he first became aware of such property. By sub-sect. 2 such disclaimer determines the rights and liabilities of the bankrupt from its date, and discharges the trustee from all personal liability from the time the property vested in him—"but except so far as is necessary to release the bankrupt, his property and the trustee, shall not affect the rights of any other person." Where is the lease—what has become of it? Sub-sect. 3 says he shall not disclaim without leave; but he may assign to a pauper before any breach of covenant. Perhaps this was not thought of. By sub-sect. 6 the Court may vest property in respect of which there is an undischarged liability in the person liable, by way of compensation—so that in a case like the principal the lease might be vested in the appellant, subject to the sub-lease I suppose and to the bankrupt's liabilities, though the proviso only applies to persons claiming under the bankrupt. But be this as it may, there affected by the bankruptcy of the lessee or the assignee of the lease. Lord Wensleydale's rule for the construction of statutes and other writings was very much relied upon, especially by the late Master of the Rolls in *Ex parte Walton* (1), where he quotes it thus:—"I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further." I have often heard Lord Wensleydale lay down that rule, which he quoted from a judgment of Burton J. in Ireland (2), and I am now content to take it as a good rule, though I heard Crompton J. say, in reference to it, that he did not set any value upon any golden rule, that they were all calculated to mislead people; and I am not sure that this will not result from what is put at the end of what I have just read, namely, that you are to abide by the grammatical and ordinary sense of the words unless that would lead to some absurdity. That last sentence opens a very wide door. I should like to have a good definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems

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is no similar provision in the Act of 1869. If no mortgagee or sub-lessee will undertake this liability it may be vested in the original lessee free from all interests created by the bankrupt. There is nothing like this, which shews forethought, in the Act of 1869. Had there been, the lease might have been vested in the appellant Hill free from the mortgage to the brewers. They, I suppose, would have been able to prove under sub-sect. 7.

The latter part of this note seems to bear on the question decided in the principal case. It is not written with that intention, but to shew, first, that leases did not under the Act of 1869 vest in trustees, unless they elected to have them; secondly, that the provision as to disclaimer only applies where they have so acted or have elected or furnished evidence of an election to take; thirdly, that the Act of 1869, intentionally or not, has made no other provision for leases the property of the bankrupt than the disclaimer and surrender. Incidentally the reasoning in the note may shew that the statute should be construed as I have said.

(1) 17 Ch. D. 756.

(2) *Warburton* v. *Loveland*, 1 Huds. & Br. 648.

absurd to one man does not seem absurd to another. This probably did not seem absurd to the drawer of this Act of Parliament, who most likely did not contemplate the consequences of what he was putting down.

I think it an unbecoming thing as a rule in those who have the administration of the law to speak disrespectfully of it; but I feel justified in making an exception in the case of this unhappy Act of Parliament which is no longer law and has not been repealed for its merits. In my opinion it ought to be construed upon the footing that the construction should lead to an absurdity rather than otherwise. I feel the very greatest difficulty in applying Lord Wensleydale's rule to this particular Act of Parliament. My judgment in this case is founded upon what to me is the plain language of this Act of Parliament. I think it is infinitely better, although an absurdity or an injustice or other objectionable result may be evolved as the consequence of your construction, to adhere to the words of an Act of Parliament and leave the legislature to set it right than to alter those words according to one's notion of an absurdity.

Now the words of the section to my mind are plain. It says—"When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants or unmarketable shares"—I want to call your Lordships' attention to this, it says "unmarketable shares," it does not say shares that are pledged, and not worth more than the sum they are pledged for—"in companies, of unprofitable contracts or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell"—and so forth "may, by writing under his hand, disclaim such property," and now I will ask your Lordships to mark the words which follow, "and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication." What is the plain sense of that? The legislature might have said "shall be determined from that date." What is the difference between saying "shall be deemed to be determined" and saying "shall be determined?"

I cannot see. Then it goes on—"and if the same is a lease be deemed to have been surrendered on the same date." I suppose they might, although it would not have been good English or good grammar, have said "shall be" or "shall have been surrendered as from that date;" but it would not have been the truth, for it would not have been in fact surrendered, and therefore, the right expression to use, to my mind, was to say that it shall be deemed to have been surrendered as from that date, "and if the same be shares in any company be deemed to be forfeited from that date." I cannot help saying it is a striking thing if this consequence should follow, which I think I suggested in the course of the argument, that by virtue of this Act of Parliament a present might be made to a company of, say £500 worth of shares which had been pledged to some person to the value of £500, and which were worth that and no more; but I doubt very much whether that would be within the section of the Act of Parliament, because the expression is "unmarketable shares" and those would not be unmarketable. Then the section says "and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt; but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt."

Now those are the plain words. It is admitted that there is a non-natural construction to be put upon them—I should not say "construction," because it is not a case of construction; it is not what Lord Wensleydale calls a modification of the words, it is a case of positive addition to the language, and an addition to the language in this remarkable way; if it is only a case of lessor and lessee, then you add no words and the lease is actually surrendered—that is the argument as I understand it; but if it is a case of lessor, lessee, and assignee of the lease, and the assignee becomes bankrupt, then you insert these words in the Act of Parliament "shall be deemed to have been surrendered." I would use the forcible language of that consummate judge James L.J. in *Ex parte Walton* (1), "it must be understood as saying 'shall as between the lessor on the one hand and the bankrupt, his trustee and estate on

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(1) 17 Ch. D. 756.

Lord Bramwell.

the other hand, be deemed to have been surrendered.'" So that in the case of lessor and lessee only, that is to say bankrupt lessee, you insert no words and there is a surrender; in the case of lessor, lessee and bankrupt assignee, you insert those words which James L.J. says must be put in. What justification is there for that? On the ground that otherwise it leads to an absurdity. But it leads to an absurdity if you put the words in—that is the mischief of it. If I could see that putting the words in would get you out of an absurdity and lead you into no other absurdity, then I should be inclined to put in the words too; but, to my mind, there is as great absurdity and as gross an injustice resulting from the insertion of those words in this particular case as there is in not inserting them in the case which he puts. I remember the Lord Justice telling me the gratification with which he had been able to get out of what he thought the mischievous consequences of this Act of Parliament. Undoubtedly it is a shocking thing to consider, as he says, that there would be the most grievous injustice and the most revolting absurdity if the Act is to be construed, as in my judgment it ought to be construed, that is to say according to its plain language; because you might have a case of an equitable deposit of a lease for value, the trustee disclaims and the lease is gone, to the great and unjust loss of the man with whom it has been deposited. But I doubt if the Lord Justice would have argued as he did had he foreseen this case. The conclusion come to is not to me intelligible. The lease is to be deemed to be surrendered as between A. and B. but not between A. and C., between them it is to exist or be deemed to exist. The shares are to be deemed forfeited as between the company and A. but not as between the company and B. to whom A. has pledged them. Nor, I suppose, as between the company and the original shareholder. What is to happen? What is to follow? May the bankrupt pay the debt and take the shares or lease? Suppose the lease is valuable to him on account of a goodwill. What is to happen? They are to be and at the same time not to be, which passes omnipotence, even that of Parliament. It is hardly an argument in construing this statute; but if its framer meant what your Lordships say his words mean, he could easily have said that the bankrupt should be discharged from all the obligations of the lease. No doubt the difficulties of the point would have arisen then, but he would have said what he meant.

For what this unhappy appellant is to do or suffer I cannot see, except this, that according to the judgment of this House, he is to pay the rent for the rest of the lease. But is he ever to have any enjoyment of the property? I cannot see that he is. If he were to bring ejectment, it would be said, "You are in this dilemma, either the lease is surrendered and then you have no title, or if it is still in existence you have assigned it to somebody else." He cannot maintain an ejectment. What is he to do? The 23rd section says "Any person interested in any disclaimed property may apply to the Court, and the Court may upon such application order possession of the disclaimed property to be delivered up to him," and so forth. Is he interested in the disclaimed property? Certainly not. He has parted with all his interest in it. His only interest in it is that unpleasant one of having a duty in respect of it. It seems to me that if he were to apply to the Court, it would be impossible that the Court would grant him possession of it. I say here is a revolting absurdity and a shocking injustice, as far as I can make it out, in the consequences, not of the construction but, of the addition which has been made to the language of the legislature; that is to say, this unfortunate man, for anything I can see, may have to pay this rent to the end of the term and yet have no enjoyment of the property. I do not see how he is to get it. When I say this man, I mean a lessee, because I am not arguing upon the particular merits of this case, for I suppose, somehow or other, as a matter of mercy, some relief will be given to him. There is no doubt the respondents may give it to him by insisting upon the payment of the rent from the mortgagees in possession. I cannot see why this course was not taken. I am speaking in the abstract. I say that the consequences of the construction put upon this Act of Parliament are that the lessee may have to pay rent and yet have no benefit from the property in respect of which he is paying the rent.

There is just one word more that I should like to say, which is this. Suppose the bankrupt is not discharged, which he may not be, unless he pays a certain amount—a certain number of shillings in the pound—(I am glad to think that in the last Act it is more onerous than it is in this Act)—at the expiration of three years from the close of the bankruptcy "if the debtor has not obtained an order of discharge, any balance remaining unpaid in respect of any debt proved in such bankruptcy shall be deemed to be a subsisting debt in the nature of a judgment debt" (1). I will not say this particular lessee, but what is a lessee to do under those circumstances? Is he to prove his debt and to have in effect a judgment debt against the bankrupt assignee of the lease? That cannot be, because, as between the assignee of the lease and the lessor the lease is determined. What is to happen I do not see.

Now, I must say, as far as my own judgment is concerned, as far as, independently of authority, I can make up my mind upon this matter, it seems to me a plain case. I think the language of the Act of Parliament is unmistakable, and I think it is a wrong and objectionable thing to endeavour to add words to an Act of Parliament or to any other document for the purpose of avoiding an absurdity that was not seen by nor in the contemplation of the person who drew the Act of Parliament or other document, and who therefore framed the provision in plain language as he thought because he knew of no better. In this particular case I cannot see but that as much mischief and injustice will result from the decision of your Lordships as would result from a decision the other way. To my mind it comes to this. The statute says the lease shall be deemed to be surrendered, your Lordships say it shall not, you do this to avoid an injustice and in doing it you cause another. At the same time although I speak in this way, I desire to add, with perfect sincerity, that I suppose, considering the weight of authority against me I must be in the wrong in the opinion I have formed, and although I cannot concur in the views which have been expressed, I am quite aware that it is right that the judgment should be the other way.

Judgment appealed against affirmed and appeal dismissed with costs.

Lords' Journals 3rd April 1884.

Solicitors for appellants: *Soames, Edwards & Jones.*

Solicitors for respondents: *Freshfields & Williams.*

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(1) 32 & 33 Vict. c. 71 s. 54 sub-s. 2.

[HOUSE OF LORDS.]

H. L. (E.)
1884
March 24.

SUETON D. GRANT & Co. . . . . . . APPELLANTS;

AND

COVERDALE, TODD, & Co. . . . . . . RESPONDENTS.

Ship—Charterparty—"Frost preventing loading."

By a charterparty a ship was to proceed to Cardiff, East Bute Dock, and there load in the customary manner from the agents of the freighters a cargo of iron. "Cargo to be supplied as fast as steamer can receive. . . . . Time to commence from the vessel being ready to load and unload and ten days on demurrage, over and above the said lay days, at £40 per day. (Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading . . . .; in which case owners to have the option of employing the steamer in some short voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship.)"

The ship arrived at the East Bute Dock and loaded part of her cargo. A frost then set in and made a canal which communicated with the dock impassable, so that the remainder of the cargo which was ready at a wharf on the canal could not for several days be brought in lighters to the dock. The cargo could not have been brought into the dock by carting or otherwise at any reasonable expense. The dock itself was not frozen over and if the cargo had been in the dock the loading might have proceeded:—

Held, affirming the decision of the Court of Appeal, that the frost did not "prevent the loading" within the meaning of the exception.

APPEAL from an order of the Court of Appeal (1).

The action was brought by the respondents against the appellants to recover demurrage, and damages for detention, under a charterparty.

At the trial before Pollock B. without a jury, at the Swansea Summer Assizes 1881, all matters of fact in the cause were referred to a special referee to report thereon to the learned judge. The material facts stated in the report were as follows:—

By a charterparty made on the 16th of December 1880 it was agreed between the plaintiffs, shipowners, and the defendants that the steamer Mennythorpe should "proceed to Cardiff, East Bute Dock, or so near thereunto as she may safely get, and there load always afloat in the customary manner from the agents of the freighters a full and complete cargo of about 1800 tons of bar or bundle iron. . . . .

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(1) 11 Q. B. D. 543.

"Cargo to be supplied as fast as steamer can receive at all hatchways for loading, and to be discharged as fast as customary with steamers. . . . .

"Time to commence from the vessel being ready to load and unload and ten days on demurrage over and above the said lay days at £40 per day. (Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading and unloading; in which case owners to have the option of employing the steamer in some short voyage trade, until receipt of written notice from charterers that they are ready to resume employment without delay to the ship.)"

There are two docks at Cardiff, the East Bute Dock and the West Bute Dock, connected by a canal with locks at both ends. The West Bute Dock is also connected by a junction canal with the Glamorganshire Canal.

Bar and bundle iron shipped at Cardiff are almost entirely manufactured by some five or six makers having their works at some distance from Cardiff. With the exception of Messrs. Crawshays, these manufacturers rent wharves or quays in the East or West Bute Docks for their own exclusive use. Messrs. Crawshays have no exclusive wharf in either dock, but they have a wharf on the Glamorganshire Canal, nearly opposite the Junction Canal leading from the Glamorganshire Canal to the East Bute Dock.

The Mennythorpe on her arrival at Cardiff was to be loaded with 1800 tons of bar and bundle iron, which was to be supplied by three firms, 400 tons by the Llynfi Company, who have a private wharf in the East Bute Dock; 400 tons by the Dowlais Company, who have private wharf accommodation in the West Bute Dock, and 1000 tons by Messrs. Crawshays, who had their portion of the intended cargo ready at their wharf on the Glamorganshire Canal at the time of the arrival of the ship at Cardiff. Crawshays forward cargoes from their wharf in lighters propelled by lightermen to alongside vessels in the East Bute Dock, which are moored at the top of that dock for the purpose of receiving cargo from their canal wharf.

The Mennythorpe arrived at the East Bute Dock on the 10th of January 1880, and was loaded with the Llynfi and Dowlais iron and a small quantity of Crawshays' iron by the 13th, and was then ready for the rest of the iron from Crawshays'. On the 13th frost set in, and from the 16th to the 31st the canal was impassable by the ice. On the 31st loading began again and was completed by the 3rd of February.

The East Bute Dock itself was never frozen over, and could the iron have been by any means brought into the dock the ship might have been loaded with slight delay only and the ship despatched to sea. Evidence was given as to the impossibility of carting such a large quantity as that from Crawshays', the largest quantity proved to have been carted at any one time being under 30 tons; and the referee found that even if it were physically possible, it was not a reasonable mode to adopt under the circumstances.

The referee found as a fact that the delay in loading was caused by the frost alone and that the iron could not have been brought into the dock by any reasonable means, neither could the defendants have obtained and loaded the ship with a like cargo from any other place or by any other means.

Pollock B. entered judgment for the defendants (1). The Court of Appeal (Brett M.R. Lindley and Fry L.JJ.) reversed this decision and entered judgment for the plaintiffs for £640.

March 21, 24. *R. E. Webster* Q.C. and *J. F. Moulton* (*Bowen Rowlands* Q.C. with them) for the appellants:—

The Court of Appeal based their decision on the previous decision in *Kay* v. *Field* (2); but the cases are not on all fours; and if they are that decision was wrong. In *Kay* v. *Field* (2) the words in the charterparty were "detention by frost not to be reckoned as lay days." Here the words are "except in the case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading." The canals being frozen the frost in fact "prevented" the "loading" as much as if the East Bute Dock had been frozen over. The referee found that

(1) 8 Q. B. D. 600.

(2) 10 Q. B. D. 241.

the only practicable way of loading was by the canals, the expense of carting making that mode of carting unreasonable and out of the question. The provision for the case of "hands striking work" and "floods or other unavoidable accidents" (which might well occur outside the East Bute Dock) shews that it cannot have been intended to limit the exception of frost to that dock. The cases relied upon by the respondents all differ in their circumstances. In *Adams* v. *Royal Mail Steam Packet Co.* (1) there were no such exceptions as in the present case. In *Kearon* v. *Pearson* (2) there was no exception in case of frost. A strike of hands which prevented "coals being brought from the pit" would in the opinion of Willes J. have absolved the charterer from loading a ship under a charterparty with an exception in favour of "strikes or any other accidents beyond their control which might prevent or delay her loading": *Fenwick* v. *Schmalz* (3). In *Hudson* v. *Ede* (4) it was held that "whenever there was no access to the ship by reason of ice from any one of the storing places from which merchandise was conveyed direct to the ship" the exception ("detention by ice and quarantine") would apply. The contract here is "to load in the customary manner from the agents of the freighters," and that must be construed with reference to all the surrounding circumstances: *Tapscott* v. *Balfour* (5), and *Postlethwaite* v. *Freeland* (6).

The usual mode of loading from Crawshays' was by lighters passing through the canals into the East Bute Dock, and not by carting. The exception applies to all cases in which the loading was directly and in fact prevented by frost and in which the cargo would in fact have been duly loaded but for the occurrence of such frost. The charterers having the cargo ready to be loaded and being prevented in fact only by the frost are discharged from liability.

Sir *F. Herschell* S.G. and *Brynmôr Jones* for the respondents were not heard.

(1) 5 C. B. (N.S.) 492.
(2) 7 H. & N. 386; 31 L. J. (Ex.) 1.
(3) Law Rep. 3 C. P. 316.
(4) Law Rep. 3 Q. B. 412.
(5) Law Rep. 8 C. P. 46.
(6) 5 App. Cas. 599.

EARL OF SELBORNE L.C.:—

My Lords, I believe that none of your Lordships have any doubt that the order appealed from in this case ought to be affirmed. The whole question of course depends upon the terms of the charterparty; and the material terms are these: On the part of the shipowner it is agreed that the ship "shall (after discharging her cargo at Middlesborough) with all convenient speed sail and proceed to Cardiff East Bute Dock, or so near thereunto as she may safely get, and there load always afloat in the customary manner from the agents of the freighter a full and complete cargo of about 1800 tons of iron." That is the shipowner's contract. The charterer contracts on his part, "Cargo to be supplied as fast as steamer can receive at all hatchways for loading." (I omit what relates to unloading and discharge.) "Time to commence from the vessel being ready to load and ten days on demurrage over and above the said lay days at £40 per day. (Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading)."

Now the exception has reference to the loading and nothing else. It is important to observe, with respect to any argument founded on the particular accidents enumerated, frosts, floods, or hands striking work, to which large general words are superadded, that those are in a printed form, and are meant therefore to suit each particular case as far as they can, but they are not introduced in contemplation of any particular case, this or any other. But the mention of "Cardiff East Bute Dock" is a part of the special terms of this particular contract, not of the printed form; it is manifest, therefore, that those words must be applied reddendo singula singulis according to the circumstances which may in point of fact be applicable to the particular case—you cannot found upon any one of them an argument of this sort, that it must of necessity have been introduced with reference to the particular place and the particular circumstances of that place.

With that observation I proceed to notice that it is not denied, and cannot be denied, that unless those words of exception according to their proper construction take this case which has happened out of the demurrage clause, the mere fact of frost or any other thing having impeded the performance of that which the charterer and not the shipowner was bound to perform will not absolve him from the consequences of keeping the ship too long. That was decided under circumstances very similar in many respects, in the case of *Kearon* v. *Pearson* (1), and decided expressly on the ground, as was pointed out I think by all the learned judges, certainly by my noble and learned friend here present (Lord Bramwell), by Mr. Baron Wilde, and by Lord Chief Baron Pollock, that there was no contract as to the particular place from which the cargo was to come, no contract as to the particular manner in which it was to be supplied, or how it was to be brought to the place of loading, and that therefore it could not be supposed that the parties were contracting about any such thing.

This exception in the contract being limited to "accidents preventing the loading," the only question is, what is the meaning of "loading"? and whether this particular frost did, in fact, prevent the loading. There are two things to be done—the operation of loading is the particular operation in which both parties have to concur. Taken literally it is spoken of in the early part of this charterparty as the thing which the shipowner is to do. The ship is to "proceed to Cardiff East Bute Dock," "and there load the cargo." No doubt, for the purpose of loading, the charterer must also do his part; he must have the cargo there to be loaded, and tender it to be put on board the ship in the usual and proper manner. Therefore the business of both parties meets and concurs in that operation of loading. When the charterer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take charge of it, everything after that is the shipowner's business, and everything before the commencement of the operation of loading, those things which are so essential to the operation of loading that they are conditions sine quibus non of that operation—everything before that is the charterer's part only. It would appear to me to be unreasonable to suppose, unless the words make it perfectly clear, that the shipowner has contracted that his ship may be detained for an unlimited time on account of impediments, whatever their nature

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(1) 7 H. & N. 386; 31 L. J. (Ex.) 1.

Earl of Selborne, L.C.

may be, to those things with which he has nothing whatever to do, which precede altogether the whole operation of loading, which are no part whatever of it, but which belong to that which is exclusively the charterer's business. He has to contract for the cargo, he has to buy the cargo, he has to convey the cargo to the place of loading and have it ready there to be put on board; and it is only when he has done those things that the duty and the obligation of the shipowner in respect of the loading arises. These words in the exception are as large as any words can be; they mention "strikes, frosts, floods, and all other unavoidable accidents preventing the loading." If therefore you are to carry back the loading to anything necessary to be done by the charterer in order to have the cargo ready to be loaded, no human being can tell where you are to stop. The bankruptcy, for instance, of the person with whom he has contracted for the supply of the iron, or disputes about the fulfilment of the contract, the refusal at a critical point of time to supply the iron, the neglect of the persons who ought to put it on board lighters to come down the canal for any distance or to be brought by sea, or to put it on the railway or bring it in any other way in which it is to be brought; all those things are of course practical impediments to the charterer having the cargo ready to be shipped at the proper place and time; but is it reasonable that the shipowner should be held to be answerable for all those things, and is that within the natural meaning of the word "loading"? Are those things any part of the operation of loading? Nothing, I suppose, is better established in law with regard to mercantile cases of this kind than the maxim, "Causa proxima, non remota, spectatur"; and it appears to me that the fact that this particular wharf was very near the Cardiff East Bute Dock can make no difference in principle if it was not the place of loading. If the cargo had to be brought from this wharf on the Glamorganshire Canal, however near it was, if it had to be brought over a passage which in point of fact was impeded, and over which it was not brought, to the place of loading, to say that the wharf on the Glamorganshire Canal was, upon a fair construction of the words, within the place of loading, appears to me to be no more tenable than if the same thing had been said of a place a mile higher up the canal where, according to the actual contract, the persons were to supply the iron, and where the owner of the iron might have been found.

That really is enough to dispose of the whole argument. The case of *Hudson* v. *Ede* (1) was referred to. I understand that case as proceeding upon the same principles, but as containing an admission of this distinction, that where there is, in a proved state of facts, an inevitable necessity that something should be done in order that there should be a loading at the place agreed upon, as for instance that the goods should be brought down part of a river from the only place from which they can be brought, even though that place is a considerable distance off, yet it being practically, according to known mercantile usage, the only place from which they can be brought to be loaded, the parties must be held to have contemplated that the goods should be loaded from that place in the usual manner unless there was an unavoidable impediment. And if the facts had been so about this particular wharf on the Glamorganshire Canal, if that had been the only possible place from which goods could be brought to be loaded at the East Bute Dock, that authority might have applied. But not only was that not the case, but in point of fact cargo not only could be, but actually had been brought up by carts to the East Bute Dock and put on board ship; and I infer from the finding of the referee that the whole might have been done by carting, though I agree that it would have been at an expense which was preposterous and unreasonable if you were to look at the interest of the charterer; but if the charterer has engaged that he will do a certain thing, he must of course pay the damage which arises from his not doing it, whatever the cause of his not doing it may be, whether it be his not being willing to incur an unreasonable expense, or whether it be any other cause.

Under these circumstances I think that your Lordships can have no hesitation in affirming the judgment appealed from, and I move your Lordships to do so with costs.

LORD WATSON:—

My Lords, I am of the same opinion. This vessel had reached her destination at the East Bute Dock, and thereupon it became the duty of the charterer to load, that is to say to bring the cargo either to the wharf, or by means of lighters to the vessel's side, and to put it on board her. The exception which he pleads is an exception in his favour, upon the obligation thus incumbent upon him, and it is for him to shew that it extends to the case which he now maintains. I am of opinion that it cannot be so extended. I think that in this case "loading" means loading in the East Bute Dock, and I am not prepared to assent to a construction of this charterparty which would imply that the word "loading" had as many different meanings as there were merchants or manufacturers of iron in Cardiff who happened to select different localities in order to store their iron for the purpose of shipment.

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(1) Law Rep. 3 Q. B. 412.

LORD BRAMWELL :—

My Lords, I am entirely of the same opinion. Whether, if these parties had met and talked over the possibility of frost preventing the passage of the iron from Crawshays' Wharf to this ship, or down the Glamorganshire Canal to Crawshays' Wharf, or any other conceivable difficulty arising from frost, whether in that case the shipowner would have agreed to bear the risk of it, the charterer bearing none of the risk of it, is more than I can say. It is utterly impossible to speculate upon such a thing as that—all that we can do is to deal with the particular words that they have used, as to which it is very likely that neither of them had in their minds any definite meaning. But the words to my mind are tolerably plain—they relate entirely to something which prevents the loading, that is to say the actual putting on board of the cargo, and I think, when you couple that with the expression in the earlier part of the charterparty, that the vessel is to "proceed to the East Bute Dock, or so near thereunto as she may safely get, and there load," the exemption or exception really does relate to the very act of loading. Then that being so, in the present case frost did not prevent the loading; what it did was to prevent the particular cargo which the charterer had provided from being brought to the place where the loading would not have been prevented.

LORD FITZGERALD:—

My Lords, I also concur. One of the terms of the contract itself was performed, the ship arrived in due course at Cardiff East Bute Dock, the place of loading according to the contract, where she was, in the language of the contract, "to load in the customary manner from the agents of the freighter *a* full and complete cargo of about 1800 tons." "Cargo to be supplied as fast as steamer can receive at all hatchways for loading." "Time to commence from the vessel being ready to load." "Demurrage over and above the lay days at £40 per day, except" (inter alia) "in case of frosts preventing the loading." There is another provision, which is not undeserving of attention, "steamer not to require to load before 9th of January." It seems to me that the exception applies only where the accident prevents the loading at the place of loading, and not where it prevents or retards the transit or conveyance of the cargo to the place of loading. The shipper was bound to have a full cargo at the place of loading, and he took on himself all the risks consequent upon delay in transit. If he had had it there it could have been loaded within the lay days, and no case of demurrage could have arisen.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 24th March 1884.

Solicitors for appellants: *Clarke, Rawlins, & Co.*

Solicitors for respondents: *Shum, Crossman, Crossman & Prichard, for Turnbull & Tilly, West Hartlepool.*

[HOUSE OF LORDS.]

H. L. (E.)
1884
March 25.

THE TIVERTON AND NORTH DEVON RAILWAY COMPANY . . . . . . APPELLANTS;

AND

ROBERT FRANCIS LOOSEMORE . . . RESPONDENT.

Railway Company—Compulsory Powers—Powers for Completion—Entry under s. 85 *of the Lands Clauses Act* 1845 *shortly before Expiration of Period allowed for completion of Railway—Right of Company to take Possession without Sheriff—Lands Clauses Consolidation Act* 1845 (8 & 9 *Vict. c.* 18) *ss.* 68, 84, 85, 91.

The special Act of a railway company enacted that "the powers of the company for the compulsory purchase of lands for the purposes of this Act shall not be exercised after the expiration of three years from the passing of this Act;" and that "if the railways are not completed within five years from the passing of this Act, then on the expiration of that period the powers by this Act granted to the company for making and completing the railways or otherwise in relation thereto shall cease to be exercised except as to so much thereof as is then completed."

A few days before the expiration of the three years the company served on a landowner a notice to treat for part of his land. A correspondence ensued, no agreement was come to, and the compensation was not assessed. Thirteen days before the expiration of the five years the company, having complied with the requirements of s. 85 of the Lands Clauses Act 1845, entered and proceeded to make the railway, the landowner objecting and resisting. The land was bonâ fide required for the railway:—

Held, reversing the judgment of the Court of Appeal and restoring the judgment of Fry J., that whether the railway could or could not have been completed within the thirteen days, the entry under s. 85 was lawful; that the company could not be restrained by injunction, but were entitled to remain and complete the railway after the expiration of the five years.

APPEAL from an order of the Court of Appeal (Lord Selborne L.C. and Jessel M.R. and Cotton L.J.) reversing an order of Fry J. The facts are fully set out in the report of the decisions below (1); and those material to this report are stated in the judgment of Earl Cairns.

The appeal was twice argued, first on July 17, 19, 1883 by

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(1) 22 Ch. D. 25. At p. 27 line 9, instead of "the small meadow and of the mill race," read "two pasture fields and of the river."

Horace Davey Q.C. and *R. E. Webster* Q.C. (*Farwell* with them) for the appellants, and by the respondent in person, before Lords Blackburn, Watson, Bramwell, and FitzGerald; and secondly on Feb. 19, 21, 1884 by *H. Davey* Q.C. (*R. E. Webster* Q.C. and *Farwell* with him) for the appellants and by the respondent in person, before Earl Cairns and the above noble and learned lords.

H. Davey Q.C. and *R. E. Webster* Q.C. (*Farwell* with them) for the appellants:—

The two questions material to this appeal are 1, whether the entry on the 6th of July was lawful; 2, whether if it was, the continuance after the expiration of the five years was unlawful. The judgments of the Lord Chancellor and Jessel M.R. seem based mainly on the first point; that of Cotton L.J. on the second. The respondent's counter-notice being too large was wholly bad, and the company were entitled to disregard it altogether and to proceed upon their own notice: *Harvey* v. *South Devon Railway Company* (1). The Courts below decided against the company on the assumption that it was bad. The entry under s. 85 of the Lands Clauses Consolidation Act 1845 need not be within the time limited for the exercise of compulsory powers, if the notice to treat be given within that time: *Marquis of Salisbury* v. *Great Northern Railway Company* (2). The entry was therefore lawful, and being once lawful how could it ever become unlawful? If a notice to treat be given within the three years, other steps may be lawfully taken after the three years and are not an exercise of the compulsory powers; e.g. entry under s. 85: *Sparrow* v. *Oxford Worcester and Wolverhampton Railway Company* (3); summoning a jury to assess compensation: *Reg.* v. *Birmingham and Oxford Junction Railway Company* (4). The notice to treat creates a relation like that of vendor and purchaser, which does not cease on the expiration of the three years; *Doe* d. *Armitstead* v. *North Staffordshire Railway Company* (5); *Worsley* v. *South Devon Railway Company* (6); *Adams* v. *London and Blackwall Railway Company* (7); *Burkinshaw*

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(1) 32 L. T. (N.S.) 1.

(2) 17 Q. B. 840.

(3) 9 Hare, 436.

(4) 15 Q. B. 634.

(5) 16 Q. B. 526.

(6) 16 Q. B. 539.

(7) 2 Mac. & G. 118.

v. *Birmingham and Oxford Junction Railway Company* (1). There was no abandonment of the notice to treat: whether there has been abandonment is a question of evidence in each case: *Richmond* v. *North London Railway Company* (2); *Kemp* v. *South Eastern Railway Company* (3); *Ystalafera Iron Company* v. *Neath and Brecon Railway Company* (4). The owner cannot complain of the company's delay; he has the remedy in his own hands of proceeding under s. 68 of the Lands Clauses Act. Probably the company could not enter after the five years, but they could compel a conveyance. The delay between December 1879 and the 6th of July 1880 in taking proceedings to assess the value under s. 23 was owing to the practice of railway companies not to proceed until they enter under s. 85; and an entry under s. 85. which gives the owner the immediate right to proceed under s. 68, might well be supposed inconsistent with a right to proceed under s. 23. For the purposes of this case the right to take and hold possession against the owner was as complete by entry under s. 85 as it would have been by proceedings under s. 23. The ground of action, not only in the form of the pleadings but in substance, was not that the entry would become invalid on the expiration of the five years, but that it was void on the 6th of July the day of entry. It was the act of the plaintiff in pulling up the sleepers &c. which prevented the company from completing the railway for use within the five years; but even if not, his conduct was such as to disentitle him to an injunction. The assessment of a surveyor under s. 85 is on the same principle as the assessment under the earlier sections. If there were any doubt it is removed by the Railway Companies Act 1867 (30 & 31 Vict. c. 127 s. 36 sub-s. 3). Under either assessment the company get possession only for the purpose of making the railway.

The respondent in person relied upon the judgments of the Court of Appeal (5), and cited *Giles* v. *London Chatham and Dover Railway Company* (6), and *Falkner* v. *Somerset and Dorset Railway Company* (7) as to counter-notice; *Wood* v. *Sutcliffe* (8) as to an injunction; *Haynes* v. *Haynes* (1), *Wing* v. *Tottenham and Hampstead Junction Railway Company* (2), *Baker* v. *Metropolitan Railway Company* (3), *Cork and Youghal Railway Company* v. *Harnett* (4), and *Stockton and Darlington Railway Company* v. *Brown* (5) as to the exercise of the company's powers; and s. 91 of the Lands Clauses Act 1845, and *Lows* v. *Telford* (6) as to a forcible entry on lands without the sheriff.

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(1) 5 Ex. 475.

(2) Law Rep. 5 Eq. 352; 3 Ch. 679.

(3) Law Rep. 7 Ch. 364.

(4) Law Rep. 17 Eq. 142.

(5) 22 Ch. D. 50–60.

(6) 1 Dr. & Sm. 406.

(7) Law Rep. 16 Eq. 458.

(8) 2 Sim. (N.S.) 163.

H. Davey Q.C. in reply:—

Even after the period limited for completion has expired the landowner may proceed by mandamus to compel the company to assess the compensation; that is his remedy and he has no right to recover the land: *Lind* v. *Isle of Wight Ferry Company* (7), decided on the 7th of November 1862, the circumstances of which case are singularly like the present. If the respondent is right in saying that the power of completing the agreement for purchase made by the notice is at an end, he must still make out also that the continued user of the land taken is one of the powers which came to an end at the expiration of the time. If the power of completing is not at an end all that the respondent could claim (if the second proposition be maintained) would be an injunction to restrain user till completion.

The House took time for consideration.

1884. March 25. EARL CAIRNS:—

My Lords, the Tiverton and North Devon Railway Act, passed on the 19th of July 1875, authorized the company to take certain land of the respondent, being part of two meadows called Tucking Mills and Mead and Tucking Mill meadow.

The powers for compulsory purchase of land were to be exercised within three years from the passing of the Act; and after five years from that date, the powers granted to the company for making and completing the railway, or otherwise in relation thereto, were to cease to be exercised except as to so much as should be then completed.

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(1) 1 Dr. & Sm. 426.

(2) Law Rep. 3 Ch. 740.

(3) 31 Beav. 504.

(4) Law Rep. 5 H. L. 111.

(5) 9 H. L. C. 246.

(6) 1 App. Cas. 414.

(7) 1 New Rep. 13; 7 L. T. (N.S.) 416.

On the 15th of July 1878, four days before the time limited for compulsory purchase, the company served the respondent with the usual notice to treat for and take the portion of the two meadows which they required and which they were authorized to purchase. It is not denied that this notice, although given within a few days of the expiration of the first period of three years, was in sufficient time, and that the machinery for completing a compulsory purchase could have been set in motion and worked, either by the company or the respondent, after the three years had expired.

Between the 15th of July 1878 and the 6th of July 1880 there was considerable supineness, on both sides, although, as I have said, either side might have been the actor and might have pushed on the statutory proceedings. The respondent, on the 2nd of August 1878, served a counter-notice on the company requiring them to purchase the whole of certain premises of which the land in the notice to treat formed a part, and again, on the 2nd of December 1878, served on the company a second notice calling on them to elect, within twenty-one days, whether they would take the whole or none of the lands in the notice of the 2nd of August 1878.

Fry J., before whom this case originally came, was of opinion that these counter-notices of the respondent were bad, and that he had not the right, which he asserted, to make the company take more land than they originally proposed to take. The Court of Appeal did not differ from Fry J. as to the invalidity of these counter-notices, nor, as I understand, do your Lordships; and I refer to them merely for the purpose of saying that this collateral controversy between the company and the respondent, as to the right of the latter to insist on these counter-notices, accounts to some extent for the circumstance that the ordinary proceedings, consequential on the notice to treat, were not earlier pursued.

As it was, nothing appears to have been done on either side between December 1878 and November 1879. In November 1879, a correspondence took place between the respondent and the agents of the company, in which an attempt was made, without success, to agree upon the quantum of land to be purchased and the price, the respondent still insisting upon and the company disputing, the validity of the respondent's counter-notices; and ultimately, on the 11th of December 1879, the company served the respondent with a notice of application to the Board of Trade under the 85th section of the Lands Clauses Consolidation Act for the appointment of a surveyor to value the lands in the notice to treat, so that the company, on depositing the money and giving a bond according to the section, might take possession of the lands.

This notice was accompanied by the following letter from the solicitor of the company, "Dear Sir,—Tiverton and North Devon Railway. I am informed possession of the land for the construction of this railway is urgently required, and I therefore send you the usual notice of the company's intention to apply to the Board of Trade to appoint a surveyor, to enable them to obtain possession under the 85th section of the Lands Clauses Act of the land which they take from you. These proceedings, as no doubt you are aware, in no way fix the purchase-money and compensation, but are simply the mode provided by the Act by which possession may be taken by the company without prejudicing the owner, it being necessary that the amount fixed by the Board of Trade surveyor shall be paid into the Bank of England, and a bond conditioned for the payment of the purchase and compensation money (when fixed) given before possession is taken."

A further correspondence hereupon arose between the respondent and the agent of the company, which continued through the months of December 1879 and January 1880. The respondent still insisted on the obligation which he contended lay on the company to take the whole of his land. He declined an offer made on behalf of the company to have this question determined on a special case to be stated for the opinion of the Court. In his letter (the 24th of December 1879), declining this offer, he says, "I have no objection to the company's proceeding under the 85th section to take possession, on depositing the value of the whole of the property comprised in my counter-notice." Ultimately Mr. Sturge, the surveyor nominated by the Board of Trade, valued the land in the notice to treat at £236 10*s*., and the additional land (should the company be compellable to purchase it) at £400. The date of this valuation was the 2nd of February 1880.

A further correspondence then took place between the solicitors of the company and the respondent, which continued till the 3rd of April 1880, and is material only as explaining the lapse of time, the respondent contending, among other things, that before the company took possession they must deposit the valuation of the additional land, £400, as well as the £236 10*s*.

The company on the 9th of April 1880 paid into the bank, under the 85th section, the £236 10*s*., to the account of the respondent, and executed their bond with two proper sureties, as required by that section, which bond was dated the 30th of April 1880, and they handed over to the respondent on the 5th of July 1880 the bond and the receipt for the money deposited with the following letter, viz.:—"Dear Sir,—Tiverton and North Devon Railway. Loosemore. I understand the company's works cannot be any longer delayed, and I therefore beg to hand you the bond, and an office copy of the Paymaster General's receipt for the amount of Mr. Sturge's valuation, and I have instructed the engineers they may take possession. I understand Mr. Nelson some time since offered to state the facts in the form of a special case (to be stated by some counsel to be agreed upon in case of difference) for the decision of the Master of the Rolls, whether or not the company are bound to take the whole of the property comprised in your counter-notice, and you may understand that my clients are still willing to do this."

The respondent at this stage and from this time on protested against the proceedings of the company, and resisted their taking possession of the land. Between the 6th and 15th of July 1880, the company and the respondent were more or less engaged in a forcible contest upon the land, the company by its workmen taking possession and commencing to work, and the respondent with his men pulling up the fencing, removing wheelbarrows and planks, and obstructing the works. Finally on the 15th of July 1880, four days before the second period of five years expired, the sheriff, under the 91st section of the Lands Clauses Consolidation Act, gave the company possession of the premises, and that possession they have since retained.

On the 24th of July, 1880, the respondent commenced his action in this case for an injunction to restrain the company from executing any works on the land in question for the purpose of completing their railway, for an injunction against their continuing in possession, and for damages. The company made a counter-claim in the action for damages by reason of the obstruction and disturbance of the respondent after the 6th of July 1880.

It was not disputed that the land of which the company took possession was required for the purpose of the railway, and it was in fact alleged by the respondent that it was used for the construction of the railway. The issue raised by the company in their defence was, that the action was misconceived and unnecessary, and that any compensation to which the respondent was entitled ought to be ascertained in accordance with the provisions of the Lands Clauses Act.

The case was heard before Fry J., and by his judgment dated the 27th of March 1882, he dismissed the respondent's claim for an injunction, he directed an inquiry as to damage sustained by the respondent by the removal of clay from the land, treating the clay as a mineral reserved out of the purchase, and awarded the respondent £15 for costs as to that part of his claim, and ordered the respondent to pay the company £30 damages in respect of their counter-claim.

On the 7th of November 1882 the Court of Appeal discharged this judgment, and granted an injunction as prayed by the respondent with costs, and directed an inquiry as to damages. It is against this judgment that the present appeal is brought.

I understand the Court of Appeal to have been of opinion that the entry by the company on the land thirteen days before the expiration of the five years was, having regard to the time at which, and the circumstances under which it took place, not bonâ fide, and not rightly or legally made. I gather this, not merely from the language used by the Lord Chancellor and the Master of the Rolls, but also from the form of the judgment, which directs an inquiry as to what damages the respondent "has sustained by reason of the wrongs complained of in the statement of claim," the wrongs complained of being the taking and holding possession before the 19th of July 1880, as well as the retaining possession and using the land afterwards. The judgment is therefore a judgment for restoration of the land, with damages for having taken or used it at all.

If I could arrive at the conclusion that the taking possession by the company of the land on the 6th or 15th of July was unlawful I should have little difficulty in following the judgment of the Court of Appeal in other respects. But I cannot arrive at that conclusion. The land was wanted for the railway, and possession was taken in order to make the railway, and not for any different or collateral object. It is settled law that the powers under the 85th section, even in the case of a compulsory purchase, are not compulsory powers, and are exerciseable after the period for compulsory purchase has expired: *Salisbury* v. *Great Northern Railway Company* (1). The period that remained between the 6th and 19th of July (thirteen days) appears a short one for making a railway across the land, but there is no evidence, or even allegation, that it could not have been done by an adequate expenditure of time and money; and even if evidence had been adduced on this head, I do not see how it is an issue which could be properly tried and decided by the Court, and I see nothing in the Act which engrafts on the absolute power given by the 85th section a qualification that possession must be taken, not only within five years, but also so long before the expiration of the five years as that the railway can be made on the land within five years. Such a reading of the 85th section would make the power to be one exerciseable, not within five years, but within five years minus so many weeks or months as would be needed to make and complete the railway. I can see here no laches or bad faith on the part of the company. Delay there undoubtedly was; but much, and indeed most, of the delay is explained by the attitude throughout taken up by the respondent, and by the controversies, generally groundless, raised by him. And in the absence of laches or bad faith I can see no ground on which the company can be pronounced in the wrong for following, within the parliamentary period, the parliamentary right given by the 85th section. The statute appears to me to place the company and the respondent by the notice to treat, in a position analogous to that of vendor and purchaser, with power to either side to have the price fixed and paid without delay, and with a further right in the company, within the period of five years and without prejudice to the machinery for ascertaining the price, on giving adequate security for the highest value of the land, to take possession and make use of the land, whatever the legal consequence of that possession after the expiration of the five years may be.

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(1) 17 Q. B. 840.

Assuming, then, the possession to have been rightfully obtained by the company prior to the 19th of July 1880, what was the relative position of the parties on and after that date? There have been cases in which a railway company has given a notice to a landowner to treat for the purchase of land and no further step has then been taken, either by the company or the landowner, and the extended period for completing the works has expired, and the question has been raised, could the company in that state of things proceed with its notice to treat, and assess the compensation under the Lands Clauses Act? Were such a case now to arise, I should be disposed to think, as I was disposed to think in *Richmond* v. *North London Railway Company* (1), that, if nothing more was done, and the company have slept upon their rights, and certainly if the delay cannot be explained, they should be held to be disabled from going on with any compulsory purchase, and in such a case the landowner should, as I think, be held to be disabled also. Both parties have been content to let the time run out. There is no rei interventus, no change of the status quo ante, nothing which requires to be undone. The whole matter has been a project merely; and, as a project, it has come to an end.

But in the case before your Lordships the state of things is essentially different. The company, before the expiration of the five years, took possession of the land, changed the whole character and formation of the ground, adapted it to their own purpose and destroyed its suitability for its former use. And, if I am correct in my reasoning, they did all this rightfully and within their statutory powers. What, then, was the position and

(1) Law Rep. 3 Ch. 680.

the duty of the company on the 19th of July 1880? Were they bound, or were they even at liberty to leave the land and hand it back to the respondent? What, in such a case, would be the remedy of the landowner for the destruction of his land? The respondent suggested that he might bring an action; but how could he maintain an action for that which was done rightfully and under statutory powers? Then it was said that he might get back the land and recover compensation under the Act because the land was "injuriously affected." But the answer is that compensation for land "injuriously affected" is only given where the land is not "taken," and here the land was "taken," and compensation, if given, must be accompanied by a transfer of the land.

It is implied, rather than actually decided, in some of the observations in the Court of Appeal that, in a case like the present, the landowner might have the choice of two rights,—a right to get back his land, if he wished to do so, and also a right, if he preferred it, to get compensation for its value under the Lands Clauses Act. Let us inquire how far this is possible. I do not dwell on the singular position in which the company would, on the 20th of July 1880, find themselves, not knowing whether they were or were not rightfully in occupation of the land, until the respondent would elect which of his remedies he would pursue. But, passing from this, I must observe that if the landowner is entitled to and desires to receive compensation he must, in order to ascertain the compensation value of the land, call upon the company, and, if necessary, force them by legal proceedings to summon a jury or appoint an arbitrator. But if the company can be forced to do this, they must have the power to do it; and if they have the power to do it, their power must, even after the expiration of five years, be, for this purpose, a continuing power. And if it be a continuing power for the purpose of assessing compensation at the instance of the landowner, I cannot see on what principle it is not a continuing power to be put in motion by the company themselves, which is what they contend they are entitled to do. The action of the company in fact, in such a case, is not so much the exercise of a power as the fulfilment of an obligation, and the five years' clause was not intended (as was said by Turner V.C. in *Webb* v. *Direct London and Portsmouth Railway Company* (1), to affect the obligations of the company. But I take it also to be a principle which runs through the whole course of the decisions under the Lands Clauses Act, that wherever a right to compensation is provided for a landowner by the machinery of the Act, it is given as the sole remedy, and that where it exists it does not exist along with a right in the landowner, at his option, to repudiate the right to compensation and recover the land. I take this to have been the principle on which *Lind* v. *Isle of Wight Ferry Company* (2), (to which we were referred in the reply) was decided by the late Lord Hatherley.

In my opinion where there has been a notice to treat, and where, before the price has been ascertained, the company has, under the statute, regularly obtained possession of the land, and proceeded to use it for making a railway, nothing more remaining to be done but the ascertainment of the price, the transaction is one that must go forward and not backward; the landowner has a continuing right under the statute to have the price fixed and paid, and that right he must pursue. To hold otherwise would, in many cases, work the greatest injustice not only to the company but even to the landowner himself, although in this particular case, for some reason not apparent, the respondent would prefer to get back his land.

I observe that the Master of the Rolls and Cotton L.J. appear to lay much weight on the words in the 85th section, "enter upon and use," and to imply that the power "to use" is a divisible power which continues till the end of the five years and no longer, and that, after the five years, the company cannot "use" the land, and must give it back. I cannot so read the 85th section. The power to use is intended to enlarge and not to limit the effect of giving possession. The power to "enter and use" appears to me to be so expressed in order to shew that the company were not to occupy, as tenants, land which they might have afterwards to give back in statu quo, and to recognise that the very object of their occupation was to enable them to convert, once and for all, the land to their own use as a thing that was never to go back to its former owner, and thenceforward to use it, as they might use their own land, in making a railway. The power to the company to enter and use appears to me to be equivalent to a power to convert to their own use, and this is completed as soon as the company enter on and appropriate the land.

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(1) 9 Hare 140.

(2) 1 New Rep. 14.

Earl Cairns.

I have naturally felt much reluctance in placing my opinion in opposition to that of the Court of Appeal; but after the best consideration that I have been able to give to the case, I am bound to say that I think the judgment of Fry J. was right and ought to be restored, and the judgment of the Court of Appeal reversed, and that the respondent should pay the costs here and in the Court of Appeal; and I move your Lordships accordingly.

LORD BLACKBURN:—

My Lords, the question raised by this appeal is one that depends, in my opinion, on the true construction of the Lands Clauses Consolidation Act 1845, and principally on the true construction of the 85th section of that Act. There have been several decisions on the construction of this section; but the precise question now raised has not, I think, been ever brought before a Court.

The respondent is owner of some land which the appellants, a railway company, had by their special Act, which incorporated the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, compulsory power to purchase for the purposes of their Act.

The special Act of the appellants received the royal assent on the 19th of July 1875. By the 39th section it is enacted that "the powers of the company for the compulsory purchase of lands for the purposes of this Act shall not be exercised after the expiration of three years from the passing of the Act," that is, after the 19th of July 1878.

By sect. 40 it is enacted that "if the railways are not completed within five years from the passing of this Act" (that is, before the 19th of July 1880), "then on the expiration of that period the powers by this Act granted to the company for making and completing the railways or otherwise in relation thereto shall cease to be exercised, except as to so much thereof as is then completed."

The company on the 15th of July 1878, only four days before their powers for the compulsory purchase of land came to an end, but still before they ceased, gave the respondent a notice to treat, dated the 12th of July, for a slip of land. The effect of this, as is now settled, was to create a relation between the company and the respondent analogous to that of purchaser and vendor, but the price was not yet ascertained. Till that was done the land still remained the property of the respondent, in equity as well as at law, but the company had acquired a right to have the price ascertained, and for that purpose to summon a jury, and then, when the price is ascertained (by sects. 69 to 80), on tender of the price to have the land conveyed to them, or if the landowner could not or would not make a title, to deposit the price ascertained in the bank, and execute a statutable conveyance, on which the lands shall vest absolutely in the promoters of the undertaking. The landowner has a correlative right; if he pleases, he may at any time before the company have issued their warrant for summoning a jury, have the amount of compensation settled by arbitration, and, if the company do not issue a warrant for summoning a jury, he may by mandamus compel them to do so. (*Reg.* v. *Birmingham and Oxford Junction Railway Company* (1)). And if the notice to treat itself has been given before the expiration of the period prescribed for the exercise of the powers for the compulsory purchase of lands, these subsequent steps may be taken by either party, at least at any time before the lapse of the prescribed period within which the powers of the company for making and completing the railway must be exercised. It has not yet finally been decided whether or not they can be exercised after the lapse of that period; and I am inclined to think, in the view which I take of the construction of the statute, that it is not necessary in this case to decide it, though from the course the argument has taken it is necessary to consider it, as I shall do later.

The respondent did not wish any part of his land to be taken unless the whole was taken and paid for. He thought he was

(1) 15 Q. B. 634.

entitled to insist on the company taking and paying for the whole or none. In this he was, according to the judgment of Fry J. wrong. I see no reason to doubt that this judgment, not reversed on this point, was right. But still, though for a mistaken reason the respondent was not willing to sell, and the company could only take his land against his will by virtue of some statutable powers, I see nothing that could have hindered them after the lapse of twenty-one days after the service of the notice of the 12th of July 1878, from proceeding to issue a warrant, having the price ascertained, and so obtaining an equitable right analogous at least to that of a purchaser where the contract is complete and the price ascertained, and on tendering or depositing that price, obtaining a complete statutable title long before the 19th of July 1880; but they did not choose to do so. They thought that they could obtain their object by means of the 85th section without ascertaining and tendering or depositing the price; and if they were right I do not see that they were to blame for trying to do so. The main question on this appeal is, as I think, whether they were right.

I think that to decide this question it is necessary to examine carefully the provisions which in the Lands Clauses Consolidation Act 1845 are grouped under the head, "And with respect to the entry upon lands by the promoters of the undertaking, be it enacted as follows." The first is sect. 84, "The promoters shall not, except by consent, enter until they shall have paid or deposited in the bank the purchase-money." I have already pointed out that when they have paid or deposited the purchase-money, under a series of clauses from 69 to 80 inclusive, they have become owners entitled to a conveyance from the former owner, or in default to a statutable conveyance, and are entitled to the immediate possession of the lands. It was not necessary to enact that they should, under such circumstances, be entitled to enter. It was at least thought safer to enact that till then they should not be entitled to enter, except for the purpose of surveying &c. Sect. 85 comes by way of proviso on this enactment. If a security, which the legislature thought sufficient, be given, the promoters may "enter upon and use such lands" without having first paid or deposited the price. I think that the intention of the legislature was that an entry for the purpose of surveying only might be made before the promoters were full owners of the land, by having paid the price, and that, on the security being given, they might enter and use the land, though they had not yet paid the price, and were not the full owners of the land. But it was not, I think, intended to relieve the promoters from their obligation to ascertain the price, which was, I think, a condition precedent to their having an equitable title, still less from their obligation to pay or deposit it, which was a condition precedent to obtaining a legal title.

It was decided in *Doe* d. *Armitstead* v. *North Staffordshire Railway Company* (1) that where a company had, under sect. 85, entered before the expiration of the period prescribed for the exercise of the powers of compulsory purchase, they might continue to hold the land after the expiration of that period, and in *Marquis of Salisbury* v. *Great Northern Railway Company* (2), it was decided that a company which had given a notice to treat within the prescribed period might enter after it had expired. This was on the ground that this right to enter and use the lands was not one of "the powers for the compulsory purchase of lands" which must be exercised within the prescribed period. Lord Campbell in the latter case says:—"We have to consider what would be the effect of a company not entering within the prescribed period. This depends much upon whether the entry is an exercise of one of the powers of compulsory purchase. In my opinion it is not. I think the power of entry is a power necessary for the completion of the purchase, but is not itself one of the powers of compulsory purchase. These powers have been, I think, exercised within the five years" (the period prescribed in that case). "Strictly speaking there is no purchase and no contract created by the notice under sect. 18; but the company and the landowner are placed by the notice in the same position as if a contract of purchase had been actually entered into by them."

The 123rd section of the Lands Clauses Consolidation Act requires that there shall be a prescribed period for the exercise of compulsory powers of purchase. There is not any provision in that Act that there shall be a prescribed period beyond which the powers for constructing the railway shall not be exercised. Such a provision is now always inserted. It appears from a note at p. 529 to *Doe* v. *North Staffordshire Railway Company* (1) that such a clause was inserted in that company's Act, which was passed in 9 & 10 Vict., though that period had not expired even at the time of the judgment, and nothing turned on it. I think the fair inference is, that though such clauses were not so universally used as to be included in the Lands Clauses Consolidation Act they were not unknown in 1845. I do not know that this can have any effect on the construction of the 85th section. If such a clause was in the Great Northern Railway Act, I think the fair inference is that the period had not run out, even at the time of the judgment in the *Marquis of Salisbury* v. *Great Northern Railway Company* (2). At all events the Court makes no allusion to such a clause. It is, however, now argued that the right to use against his will, without payment of the price, the lands still remaining the lands of the owner, is not a power granted to the company for the making and completing of the railways, and did not cease on the 19th of July 1880. This, it is said, follows from the making of the quasi contract, after which it is argued neither the company nor the landowner can, without the consent of the other, resile from the quasi contract any more than they could from an actual contract.

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(1) 16 Q. B. 526.

(2) 17 Q. B. 840.

I do not think that the analogy between an actual contract and a quasi contract is complete; but I think it is so thus far, that neither side can by its laches or misconduct take away from the other its right to enforce the performance of the contract or quasi contract, or claim compensation for its non-fulfilment; but either side may by its laches or misconduct deprive itself of all right to enforce the contract or quasi contract against the other. And I do not see anything unjust or contrary to principle in holding that if a company delays completing a compulsory quasi contract for purchase, till it can no longer exercise the powers for the sake of which it was entrusted with the power of compulsory purchase, that quasi contract should, at least at the option of the landowner, be at an end. This was the opinion of Lord

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(1) 16 Q. B. 526.

(2) 17 Q. B. 840.

Romilly in *Richmond* v. *North London Railway Company* (1), and though on appeal Lord Cairns did not think it necessary to decide this, he did not, I think, express dissent from it (2). But it is not, I think, necessary to decide this question now.

But it was said, and I think justly, that in construing an Act of Parliament, we ought not to put a construction on it that would work injustice, or even hardship, or inconvenience, unless it is clear that such was the intention of the legislature. And it was said that a landowner on whom a notice to treat had been served, and who was prevented from the time it was so served from making full use of his land, ought not to be prevented from recovering payment from the company merely because the period for exercising the powers for making and completing the railway had expired, that being a matter for which he was not at all to blame. That is not the present case; but I think the course of the argument on the last occasion when this case was argued at your Lordships' bar makes it advisable to think of it.

I do not think that the issuing of a warrant to summon a jury to assess compensation can properly be called one of the powers for making and completing the railway, though in some cases it may be one in relation thereto.

If a landowner on whom a notice to treat had been served, and, no more done, applied for a mandamus to the company to issue their warrant to summon a jury, I think that the Court might, in the exercise of its discretionary power, refuse to issue the writ, if satisfied that the applicant had improperly delayed his application till the company could make no use of the land; but if the writ were issued I, as at present advised, think it could not be a good return that the company had allowed the prescribed period for exercising their statutable powers for completing the railway to elapse, and consequently could not use the land so advantageously as they might have done if they had taken it at the time when they gave their notice to treat. No such case is made here, and it is not therefore necessary to decide it; but I have, to say the least, great doubt whether it could lie in the mouth of the company to set up their own delay.

And if the case was within the 68th section, and the landowner

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(1) Law Rep. 5 Eq. 352.

(2) Law Rep. 3 Ch. 679.

Lord Blackburn.

strictly following its provisions, gave a notice in writing "stating in such notice the nature of his interest in such lands in respect of which he claims compensation, and the amount of compensation so claimed," and required the company to issue their warrant, and then, after the lapse of twenty-one days sought by action in one of the superior Courts to recover the amount of compensation so claimed, could it be a good plea that the period prescribed for exercising their statutable powers for making and completing the railway had expired? I think it could not, even if the intention of the legislature appearing on the statute had been plain that the warrants for summoning juries were in general to be within a specified period, which is not the case. I should doubt whether the incapacity of the company, brought about by their own delay, to comply with the condition of issuing the warrant would be any defence. It would be quite different if it could be shewn that the delay was brought about by the default of the plaintiff. This remedy, which if I am right is a very efficient one, could only be used by a landowner who is willing to give up his land. But if the landowner is desirous, as in this case he is, for any reason to keep his land, the question seems to me different. The company can only claim to keep the land, before they have bought it, by virtue of the statutable power given by sect. 85.

It is necessary I think to decide whether the power to use the land on which the company have entered is a power granted to the company for the purpose of making and completing the railways, and so ceased to be capable of being exercised on the 19th of July 1880; and I think it is such a power. It is true that sect. 68 gives the landowner, whose lands are thus taken without paying the price, very stringent powers for forcing on the assessment of the price; and I suppose a willing seller would generally avail himself of those powers; I see nothing, however, in the Act to prevent his having recourse to the powers given by the earlier sections. And I certainly see nothing to prevent the promoters from issuing their warrant, and having the price assessed against an unwilling vendor, even after they have entered under sect. 85. When, in either way, the price is ascertained and paid, the promoters will be full owners. But if, whilst not either equitable or legal owners, they seek to use the land against the will of the owner, I think they are exercising a statutable power given for the making of the railway.

Since this opinion was written and printed I find that the noble Earl now on the woolsack has come to a contrary conclusion, and thinks that the transaction is one that must go forward and not backward: I need not say that this greatly shakes my confidence in my opinion; but I still retain the opinion though less confidently.

It was suggested that on my construction, the company could not complete their railway, even upon their own land purchased and paid for, unless they had completed it before the 19th of July 1880. I do not think so. They being a company incorporated for the purpose of making the railways, it is not ultra vires for them to make them; and if they can, by the exercise of their common law powers as landowners, complete the railway, I do not see why they should not do so, though, if it is not practicable to do so without using some power granted by the legislature, they cannot do it.

The statement of claim, more especially the 14th paragraph, shews that the company had not, on the day when the writ was issued (24th July 1880), in any sense completed the line, or that portion of it on the respondent's land. The Court of Appeal, or at least the Lord Chancellor and the Master of the Rolls, thought when the company entered on the 6th of July, having only a fortnight left, it was manifestly impossible to complete within that period. It is perhaps, not possible, as a matter of law, to say what can be done in a fortnight if people exert themselves, and, therefore, I should pause before saying that the entry on the 6th of July 1880, was shewn here to be an abuse of the statutable powers of the company. But in my view of the construction of the statute, as soon as it appeared that by the efflux of time they could no longer use the land without the consent of the owner (and I think that is shewn) it follows that they could no longer hold it.

If therefore the case depended on my opinion, I could not agree with the motion of the noble Earl; but as I believe the majority of your Lordships agree with it, that is immaterial. I do not dissent, and I believe it to be of more consequence that this point should be settled than how it is settled.

LORD WATSON:—

My Lords, the point to be determined in this appeal is one of general importance, and I have felt much difficulty in dealing with it. The opinion which I originally formed was unfavourable to the appellants, but further consideration has led me to the conclusion that they ought to prevail, and that the judgment of the Court of Appeal must be reversed.

All of your Lordships who were present at the first hearing of this cause thought that the various propositions maintained by the respondent were (with the exception of the one point decided in his favour by the Court of Appeal) quite untenable; and, being of the same opinion, I shall say no more about them.

The difficulty which I have experienced in considering the case, arises upon the construction of the words "enter upon and use," as these occur in the 85th section of the Lands Clauses Act, assuming, as I am prepared to hold, that proceedings were rightly taken by the appellants under that section in the year 1880. The fact that the appellants entered upon and began to use the respondent's land included in their notice to treat, a fortnight only before the expiry of the statutory powers for making and completing their railway, has never appeared to me to be a circumstance which can affect the propriety or the legality of the entry at the time when it was made. It is impossible to say what progress might have been made by the appellants between the 6th and the 19th days of July 1880, if their operations had not been forcibly resisted by the respondent until the 15th of that month, when they obtained an entry from the sheriff in terms of sect. 91. Besides, sect. 40 of their special Act, as I read it, left the appellant company at liberty to exercise each and every power which they then had, in relation to the making and completing of their line, within the period of five years from the passing of the Act. It enacts that on the expiry of five years certain powers shall "cease to be exercised," but it does not enact that no such power shall be set in motion unless it can be fully exercised within five years, and I am accordingly of opinion that the appellants were, during the currency of the period limited by their specail Act, as much entitled to avail themselves of the provisions of sect. 85 as of any other statutory power which they possessed.

Save for the special provisions made in that behalf, promoters taking lands by compulsion, in terms of the Act of 1845, could not have got possession until they paid the price, nor would they have been in safety to part with the price until they got a conveyance from some one having a clear title. To obviate the inconveniences which might have arisen from that state of matters, enactments were introduced with the view of enabling the promoters of an undertaking, after ascertainment of the purchase-money or compensation, to obtain immediate possession of lands taken by compulsory purchase, in cases where the owners are absent from the kingdom or cannot be found, as well as in the case of an owner refusing to convey, or failing to adduce a good and satisfactory title. In these cases it is provided (sects. 75 and 77) that the promoters, upon their complying with the conditions which the Act prescribes as to deposit of the price, "shall be entitled to immediate possession of such lands." It does not, in my opinion, admit of dispute that possession taken by the promoters in virtue of these provisions of the Act, is in all respects equivalent to possession voluntarily given to a purchaser under a completed contract of sale.

The language used in sects. 84 and 85 to describe the rights thereby conferred upon the promoters, differs from that of the clauses to which I have referred. These last clauses have no application until the quasi-contract constituted by a notice to treat in terms of sect. 18, has been perfected by the due ascertainment of the purchase-money or compensation payable in respect of the land to be taken; whereas sects. 84 and 85, in so far as they give any active right to the promoters, apply to a period of time antecedent to settlement of the price. In the Act itself, sects. 84 to 91 inclusive are described as provisions "with respect to the entry upon lands by the promoters of the undertaking;" and the context shews that the expression "entry upon lands" was meant to cover, not merely permanent possession of the lands by the promoters as purchasers, but likewise temporary and partial possession by them, for limited purposes. Sect. 84 begins with a prohibitory enactment restraining the promoters from "entering upon" any lands without the consent of the owner, until they have paid the purchase-money or deposited it in manner before provided; and concludes with a proviso that they shall nevertheless, subject to certain specified conditions, have power to enter upon such lands for the purpose merely of surveying and taking levels, probing or boring to ascertain the nature of the soil, and of setting out the line of the works. The prohibition against "entering on" the lands obviously refers to the taking of permanent possession, which is regulated by preceding clauses; the right of entry given by the proviso is plainly a right of a limited and temporary character.

Then comes sect. 85, which gives the promoters power to "enter upon and use" lands requiring to be purchased or permanently used, "before an agreement shall have been come to, or an award made, or verdict given for the purchase-money or compensation to be paid by them in respect of such lands." The determination of the present case depends, in my opinion, upon the meaning to be attached to these words "enter upon and use." Do they signify permanent possession by the promoters, such as they are entitled to, upon payment of the purchase-money, or by virtue of sects. 75 and 77; or do they denote a limited kind of possession, permitted by the legislature, for certain purposes only, and therefore terminable by the landowner when these purposes can no longer be fulfilled? In the Court of Appeal the late Master of the Rolls and Cotton L.J. were of opinion that the words "and use" impose a restriction upon the right of entry. The late Master of the Rolls said, "As I read the section there is no right to enter and use except for the purposes of the Act. It is not merely entering; it is entering and using. If they cannot use, it seems to me they cannot retain possession against the landowner." My noble and learned friend (Lord Blackburn) takes substantially the same view of the statutory power conferred by sect. 85; and if such a limitation is implied in the addition of the word "use," I think it would necessarily follow that the appellants, from and after the 19th of July 1880, had no right to retain possession against Mr. Loosemore. With all respect for these views, I am unable, on consideration, to assent to them.

I venture to think that no right of entry is given by sect. 85 to promoters who neither have made an agreement to purchase land (leaving the price to be ascertained in manner therein stipulated), nor have created, by notice in terms of sect. 18, an inchoate statutory contract of purchase and sale. In the case of compulsory taking, that right of entry is, in my opinion, a right not independent of, but consequent upon, the landowner and the promoters being placed, by the notice to treat, in a position analogous to that of vendor and purchaser. I cannot conceive it to have been the intention of the legislature to give such a right of entry to promoters before the extent of the land to be taken was fixed by agreement or notice, and before they were under any legal obligation to take and pay for the land. On the other hand, when the promoters have come under an obligation, enforceable by the landowner, to take and pay for a definite portion of his land, there does not appear to be any à priori improbability that the legislature should have permitted them to take possession under their contract, though not yet perfected, due precautions being taken to secure payment of the purchase-money when its amount has been ascertained. I need scarcely add that the provisions of sect. 85 are very carefully framed with the view of giving that security to the landowner.

The concluding enactments of sect. 85 appear to me to be of importance in considering the nature of the entry thereby authorized. These enactments are to the effect that, upon a deposit being made and security found for the payment of such compensation as may be determined to be payable by the promoters, it shall be lawful for them "to enter upon and use such lands, without having first paid or deposited the purchase-money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them." The reference to the preliminary conditions required "in other cases," to my mind, indicates that the entry was to be of the same character as that authorized in these other cases. It implies that sect. 85 was meant to give the promoters a right of entry which but for its provisions they could not have obtained, except by deposit of the purchase-money, in other words that the right given by sect. 85 is of the same quality as that conferred by sects. 75 and 77, the only difference being that in sect. 85 the deposit of an estimated sum, and the granting of a bond with two

Lord Watson.

sufficient sureties, are substituted for payment or deposit of the ascertained price.

Having regard solely to the provisions of the Lands Clauses Act, there seems to be no reason for holding entry under sect. 85 to be temporary or defeasible, because the provisions of that Act do not impose any limitation in point of time, either upon possession of the land, or upon the uses to be made of it. Sect. 123 limits the time within which powers of compulsory purchase must be exercised; but such a limitation as is enacted by the 40th section of the appellants' special Act forms no part of the scheme of the general statute. When possession has been taken in terms of sect. 85, the landowner has no right whatever given him by that statute to resume possession, and to claim compensation, as the respondent does, for disturbance of the soil occasioned by the operation of the promoters. His only right is to have the compensation due to him ascertained and paid. It is a significant circumstance that in sect. 85 no provision is made for compensating the landowner on the footing that the possession of the promoters was to be or might be limited in its duration; whilst sect. 84, which provides for temporary entry, also provides, as a condition of that entry, that the promoters shall make compensation for any damage thereby occasioned to the owners or occupiers of the land. I therefore agree with your Lordships in thinking that according to the sound construction of the general Act, the word "use" in sect. 85 was not added for the purpose of restricting the right of entry, but in order to make it clear beyond dispute that the promoters were to have the same powers of using the land as if they had entered after payment or deposit of the purchase-money.

The question remains whether sect. 85 must be otherwise construed when it is read in connection with sect. 40 of the appellants' special Act. I concede that the clauses of the general Act are capable of receiving a wider or a narrower interpretation, when they are brought into contact with provisions in the special Act which are calculated to qualify their original meaning; but I do not think that the right of entry given by sect. 85 is to any extent qualified by the provisions of sect. 40. That section may seriously affect the rights of the appellants in regard to the construction of works upon the land taken from the respondent; because, after the 19th of July 1880, they had only the rights of a common law proprietor, without any statutory powers. That disability will however attach to the appellants, in the case of lands upon which they have entered after payment, or on deposit of the price, as well as in the case of lands of which they have taken possession in virtue of sect. 85. On the other hand, the right which the respondent has under sect. 85 of the Lands Clauses Act is not impaired by sect. 40. He can still compel them to have the purchase-money or compensation payable to him ascertained, and he has besides ample security that when ascertained it will be paid to him.

It was argued by the respondent that the legal effect of sect. 40 is to give him a choice between two alternatives,—that instead of proceeding to enforce the sale in terms of the Act, he may rescind it, and take back his land, the appellants being liable to him in damages for the injury done by their operations whilst they were temporarily, but legally, in possession under sect. 85. Neither the general Act nor the appellants' special Act provides compensation for any such injury, and that is a circumstance which, in itself, affords strong confirmation of the view that the legislature did not, in enacting sect. 40, intend to give the respondent any right to deprive the appellants of the possession which they had lawfully obtained by compliance with the provisions of sect. 85.

I accordingly concur in the judgment which has been proposed by the noble and learned Earl on the woolsack.

LORD BRAMWELL:—

My Lords, I have been favoured with an opportunity of reading the opinion of the noble and learned Earl on the woolsack, and I say most sincerely that I do not think I can add to the weight or value of it; but, as I have said on other occasions, I think it is due to those from whose opinion I am differing to shew that I have done my best to understand the case and to form an independent opinion of my own. I therefore propose to read to your Lordships what I had prepared before the second argument.

By the notice of the 12th of July 1878, the appellants' acquired, on due ascertainment and payment of the compensation, a right to the premises in question, and to have a conveyance of them from the respondent. He thereby acquired a right, on executing a conveyance, to have the compensation paid to him. Each party acquired all ancillary and consequential rights given by the statute. The respondent had the right to have the compensation ascertained and paid to him, and if the appellants entered before that, the respondent had all the rights given by sects. 84 and 85, and perhaps I might add sect. 68. Whether the respondent retains his right to make the appellants take and pay for the land, it is not necessary to determine. He may, as sometimes happens, so have conducted himself as to have given an option to the appellants, so that they may say they will or will not take his land. If he can make them do it, it is a strong argument against him in this case. All I will say on that head is, that though he would have to aver and prove readiness and willingness, that does not mean that he liked it, but that he could and would convey on payment. But I think it immaterial to decide this; for, whether he has lost his right or not, I think the appellants have not lost theirs as against him. If they have, it must be by something that occurred between the 12th of July 1878, and the 6th of July 1880, the day they entered on the plaintiff's land. Now what happened between those days to have this effect? In my opinion, nothing. I quite agree that they might abandon their notice to purchase. If they had said so in so many words, and the respondent had assented, no doubt the notice would have ceased to have any effect. It would have operated like an agreement to rescind a contract. And no doubt what can be done in words can be done by conduct; and further it can be done unintentionally by conduct such that those to be affected by it reasonably infer the intention. But what is there here to shew that the respondent could reasonably infer that the appellants had abandoned their notice to take? On the one side, he knew they must have the land; it was necessary to complete their line, they had given their notice and not withdrawn it expressly. What is there to set against this? On the 2nd of August the respondent gave the appellants what is called a counter-notice—a perfectly idle one, requiring them to take premises they were clearly not bound to take. They were not bound to notice this. On the 2nd of December 1878, he gave a further notice, equally idle, that unless they elected within twenty-one days to take all or none of the land, he should consider that they would not take the whole. It is said that, as he had said they should not take part, this was equivalent to saying he should consider they would neither take all nor part. I do not think so. But it is immaterial. He had no right to call on them to elect, as he did, between all or none, and they were not bound to notice it. There are some cases where there is a duty to answer, and where silence gives consent. But that is not the case where the proposal, or offer, or statement is an impertinence. There is no duty then to answer, and silence gives rise to no inference.

The matter rests till November 1879, when the appellants begin an endeavour to come to some arrangement with the respondent to settle the difference between them. They do all they can, but are baffled by the respondent, till, on the 6th of July, the appellants take possession. I cannot help saying that a strong light is thrown on the respondent's conduct and motives by this, that he claimed £2000 for his property which the Surveyor of the Board of Trade valued at £636 10*s*., a claim preposterous as to the quantity of property he insisted should be taken, and as to the amount of compensation claimed. Now, if he could reasonably infer that the notice was abandoned it must be from the company's silence from the 2nd of August 1878, to November 1879. As I have said, it is impossible he could reasonably infer this, for the land was a necessity to them. All he had to set against this was their silence after his preposterous claim. Before your Lordships he said he supposed the appellants had abandoned the intention of making the line; yet in April 1880 he was concerned for landowners whose land was being taken. This cannot be; in his correspondence there is no suggestion of such a belief. There really is no ground for saying the notice was, or was supposed to be, abandoned. This was the opinion of Fry J., and I do not understand that in this the Court of Appeal differed with him. I hold, therefore, that the appellants, so far as this objection is concerned, retained the right to take possession given by s. 85.

But I quite agree that if they did not exercise that right for the purpose for which it was given, viz. making the railway, they were wrongdoers. I should say that in such case they would be in a sense, even if a conveyance had been made to them. It would perhaps be necessary for the landowner to obtain a reconveyance, but they would have no right to retain the land and use it for purposes for which they had no right to take it. But, in my opinion, the appellants could use it for the purpose for which they had a right to take it. They could make the railway on it, not perhaps within the thirteen days, though I am by no means sure of that when one remembers that the railway from York to Scarborough, fifty miles, was made in a year—that is to say, at the rate of a mile a week. They could not well have made it in thirteen days; and I think it was taken both before Fry J. and in the Court of Appeal, that the railway would not be made within the thirteen days. But I am of opinion on the reason of the thing and authority that the appellants were not limited to the thirteen days for making the railway. This depends on sect. 40 of the appellants' Act: "If the railways are not completed within five years, then, on the expiration of that period, the powers by this Act granted for making and completing the railways or otherwise in relation thereto shall cease to be exercised, except as to so much thereof as is then completed." This means those powers that are "granted" by the Act, and which without the Act would not be possessed, e.g., powers to divert streams, or divert, raise, or lower roads,—possibly the powers in sects. 84 and 85. It does not mean powers to deal with land which they had a right to take and use. There is no power to construct the railway granted by the Act. Suppose, as I have said, they had a conveyance, could they not go on with the making of the railway after the five years? What difference is there when they enter under sect. 85? What are they to take and use the land for, except for the same purposes and to the same extent as if it were conveyed to them? To make the railway is not a power given to them. To take the land compulsorily is; when they have got it, they make the railway on it by virtue of their possession. I do not know what the objection is. Is it that the appellants could not make this bit of railway, or is it that they could not make the whole railway? Is it meant that if the railway is 100 miles long, and is unfinished at one end for twenty yards at the end of the prescribed time, but finished at the other, a landowner who has conveyed his land on which the line is finished may say to the undertakers, You must restore me my land, for you cannot make your railway? Or, if fifty miles are made at one end, and fifty at the other, with a gap of a few yards unfinished within the prescribed time, though the land is the undertakers', is it meant they cannot join the two parts? Impossible. I repeat they do not make the railway under the powers of the Act. They take the land under those powers. They make the railway as having the right to possess the land. If they do make the line, can they be punished? Can the Attorney-General interfere? Can the landowner object? To say he can is to beg the question.

But there is another point I think, as well as I understand, that of Cotton L.J. It was said that by sect. 85 "the promoters may enter upon and use such lands"—that to enter was a power, and to use was a power, and that the latter power ceased at the end of the five years. This certainly would be an unfortunate conclusion for promoters. The insertion of the word "use," doubtless intended to extend these powers, would have the effect of limiting them. For if the words "enter upon" alone had been there this point would not arise. Can it make any difference that "use" is there? It is to be observed that several times in the 85th section the word "enter" occurs without the word "use." In sect. 84 "enter" alone is used. True that when there is a right to enter under sect. 84 the price is deposited, but all questions between the parties are not settled, and the owner is as safe under the provisions of sect. 85 as of sect. 84. But, further, by sect. 85 the promoters may "enter upon and use such lands without having first paid or deposited the purchase-money in other cases required to be paid or deposited before entering," &c. What does this mean but that when they have taken those steps mentioned in sect. 85, they may use the land as they might if they had paid for it or deposited the price? I cannot, there-

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fore, agree to this objection. What is there now to prevent the appellants issuing their warrant to have the compensation assessed? And, if they can, is it supposable that they may be turned out and afterwards re-enter?

As to the authorities, I do not find any one in point, that is any one which says that when there has been a lawful entering under sect. 85 the promoters may use the land, though the time for the exercise of the "powers" given by the Act has elapsed. But in the *Marquis of Salisbury* v. *Great Northern Railway Company* (1) there is no limitation put by the Court on the time within which the company may complete, having entered under sect. 85. It is not said in the report nor in the judgment whether the time for exercising the powers for making the railway had or had not expired. And Wightman J. says, "It is admitted that *entry* by the company within the five years would have made the exercise of their compulsory powers complete."

Worsley v. *South Devon Railway Company* (2) was a special pleading question in form, but in reality a substantial question. The Court decided that, whereas it was contended that the replication was good, because the pleas disclosed no claim to an interest in land, "that the interest claimed by the pleas is much more than a license." But from what appears in the report all that the defendants claimed was that they had "entered and continued in possession." Lord Campbell in *Marquis of Salisbury* v. *Great Northern Railway Company* (3) expressly says, referring to this case, that "a plea of entry by a railway company under similar circumstances was held to set up a legal interest in the land." In *Doe* v. *North Staffordshire Railway Company* (4) the judgment is that the absence of the word "take" in the 85th section is immaterial, that the landowner is to take steps to ascertain compensation under sect. 68. And the Court says: "If the original entry was lawful the present possession is lawful." Not a word about its only being so till the general powers expire. The whole tenor of the authorities is that when the notice to treat has been given each party is bound for ever, and that though it is so, powers under sect. 85 must be exercised by entry within the time limited for exercising general powers, that that suffices to give a possessory title whether the railway is finished or not.

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(1) 17 Q. B. 840, 858.
(2) 16 Q. B. 539.
(3) 17 Q. B. 840, 849.
(4) 16 Q. B. 526, 537.

I now proceed to examine the judgments appealed from. I need not profess my respect for those who delivered them. I content myself with saying there are not three others more entitled to it. But, first, I must notice that of Fry J. He seems to me to put the case most forcibly and clearly on p. 177 of the Appendix, where, after saying that the notice to treat establishes a relation between the company and the landowner, he adds, "It is a relation which binds the company to take the land and binds the landowner to give up the land, subject to his right to compensation." His Lordship proceeds to shew that the powers or duties of the company for completing the purchase survive the five years.

My Lord Chancellor says, that if untouched by authority, he should have thought that the "use of land," of which possession had been taken under the 85th section, and also every step necessary to be taken by the company against an unwilling landowner who had entered into no agreement with them, "would be an exercise of powers" which were granted for making and completing the railways, which must, at least, mean that they must no longer be exercised by the company at its own will and for its own benefit after the 19th of July 1880. But with great deference, what difference does it make that the landowner is unwilling, and that there is no agreement? If these powers to make the line on land they have a right to take expire when the landowner is unwilling, and there is no agreement, they do so equally when there is. His Lordship says, page 195, line 14:—"The power of entry confers no right to possession, except for the purpose of making the statutory works under the Act." True, and they can make them, unless it is unlawful to do so, and I say with all respect, that it is not. Then he says, page 196, that to enter "not for the purpose of making any works under the statutory powers, but for acquiring a possessory title to the land against the landowner, and then making a railway over it, not under the Act, but as under an ordinary landowner's title, is, in my opinion, an abuse of the Act." But, with submission, the *works* are not made "under statutory powers," not "under the Act," in any case.

The late Master of the Rolls says, "The appeal is from a decision that the plaintiff has lost his ordinary rights of ownership." Really it is nothing of the kind. There is something a little rhetorical, and then it is said (which is repeated afterwards) that the right to retain possession has ceased because the railway is not completed in five years. And he proceeds to shew that the ownership is not changed. But it is not said that it is. At page 199 he says the power "must be used fairly, or as it is called, bonâ fide, and with a view of carrying out the objects of the Act. It is not a proper user of it to make an entry on the land, not for the purpose of constructing the works within the period limited by the powers of the Act, but with a view of acquiring a right of ownership, or one equivalent to it, with the idea of constructing the works under that right or quasi right, after the period pointed out by the Act as limited for the construction of the works has expired." Now first, I repeat there is no time limited for the construction of the works, but only for the powers granted. If this remark was correct it would equally apply where there was a conveyance.

Cotton L.J. seems to consider that the entry was lawful, but that the case was not the same as though the company owned the land, and that not being owners their powers had expired. But he also says, page 204, line 21, "They had no right to retain this land—not theirs, but that of the plaintiff—for the purpose of making their railway, when they had no statutory power enabling them to make the railway." With submission, as far as its mere construction went, they never had any.

I am of opinion that this judgment should be reversed. Supposing that your Lordships are of a different opinion, at least no injunction ought to be granted. I am of opinion that the appellants are still entitled to have the compensation for this land assessed, and, on payment of the amount, to have it conveyed to them. At all events, they are entitled to raise this question. By granting the injunction, the respondent will be entitled to resume possession, and, I suppose, to undo what the appellants have done. If they can succeed in procuring a conveyance, the possibility of this waste will be saved. If not, the respondent will be at liberty to bring a fresh action, which, doubtless, he will not regret, and in which full justice will be done him. It is not pretended that he is inconvenienced by the present condition of things; at all events, not so inconvenienced but that damages will compensate him.

I had prepared that judgment after the first argument of this case at the Bar; but what has occurred since the first argument causes me to add what I am about to read to your Lordships.

It seems to me of the greatest importance to ascertain whether those rights which each party acquired by the notice to treat still remain. For, if they do, it is impossible to suppose that the ancillary and incidental rights are gone. And the question is not whether the respondent could obtain a writ of mandamus to the appellants to issue their warrant to the sheriff to ascertain the amount to be paid to him. It is possible that his vexatious conduct would prevent his obtaining specific performance. But the question is what his legal right is, could he maintain an action against the appellants if they refused to issue their warrant? And it is clear that he could if it is true, as I believe, that the appellants could make no good return to a mandamus to do so. But if the respondent has that right, how have the appellants lost power to issue the warrant? Is it a power at the respondent's option? But what have the appellants done? Something is said about laches and misconduct. But of what laches and misconduct have the appellants been guilty? It is said they did not *choose* to issue the warrant and have the price ascertained. True, and the respondent did not *choose* to call on them to do so. As to his not being willing to sell, that is immaterial—doubly so, for his reason was a wish to get what he must have known he was not entitled to, and, the contract or quasi contract having been made by the notice to treat, he knew both parties were bound, and it was his own fault if he was prevented for any time from making full use of his land. But why should the appellants *choose* to issue their warrant? They had a right to get possession of the land—why should they do more?

Lord Bramwell.

They had given the respondent every right necessary for his protection. There seems a vague idea that they ought to have proceeded sooner under sect. 85, and that they could only "enter upon" the land under sect. 85 if they entered so long before the end of the five years that they could and I suppose did make the line. But this seems to be arguing in a circle. They could not enter and use because they could not make the line, and they could not make the line because they could not enter and "use." Suppose that unhappy word had been left out. But what does the argument come to? The entry was lawful. It cannot be said that by no possibility could the line have been made within the fourteen days of the five years remaining. Or, if it was impossible in this case, suppose one where it was not impossible but might have been though it was not done. In that case even according to the argument for the respondent the entry would be lawful, though, according to the same argument, continuing to use after the five years would not be. What would follow? Would the land be restored to the owner? If so, would he have any right of action for damage? If making the railway after the five years is not ultrà vires when the land has been purchased, neither is it in this case—which however seems to have been the ground of the judgment against the appellants.

Still further, if the entry was rightful, the judgment is wrong, for it proceeds on the ground that the entry was or became wrongful because the railway could not be or was not made within the fourteen days. Sects. 84 and 85 seem to me to add to the compulsory contract that which is often found in voluntary contracts, viz., a right to take possession before the conveyance is completed.

One word more; suppose the line to have been made within the five years, could the company use it? It may be said yes, because that would not be executing a power for making and completing the railway or in relation thereto. But suppose that they had purchased and got a conveyance under their compulsory powers of this land, could they then complete their railway? To hold that they could not, is impossible. Then they could. If they could, then completing the railway after the five years is not ultrà vires in itself. Then, they may take steps to get a conveyance of the land for that purpose. And yet it is said that having lawfully entered and using it for that purpose, they must cease to do so till it is conveyed to them.

I concur in the motion of the noble and learned Earl.

LORD FITZGERALD:—

My Lords, from an early period of the argument I had formed the opinion that the judgment of Fry J. was correct. The facts have been so completely reviewed by the noble and learned Earl that it is wholly unnecessary again to advert to them, save for the purpose of expressing my opinion that there never was any just ground for contending that the notice to treat had been abandoned, or that any state of circumstances supervened from which the respondent could properly infer or did in fact infer that the company had abandoned or did not intend to follow up their notice to treat. There was no doubt great delay, but no one can read the evidence and correspondence without seeing that the respondent is the party principally responsible for that delay, and that many devices were resorted to by the respondent for the purpose of impeding the company and thereby coercing them to purchase the whole of the lands specified in the respondent's counter notice.

I am also clearly of opinion that the entry of the appellants under sect. 85 was so made bonâ fide for the purpose of making and maintaining their railway. I advert to this in the first instance as the contrary view seems to have been entertained by the Court of Appeal and to have influenced the judgment of that Court. The notice to treat having been given it fixed the land to be taken, leaving only the price to be ascertained. The language of judges in describing the relative rights and obligations springing from the notice to treat has somewhat varied, and my noble and learned friend opposite (Lord Blackburn) has gone as far as any in the *Ayr Harbour Trustees* v. *Oswald* (1), where he says, "This had the effect of a purchase by the trustees absolutely of the piece of ground," the only question remaining being what was due for that compulsory taking.

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(1) 8 App. Cas. 632.

The company could not without the consent or acquiescence of the landowner recede from the statutory position which they had assumed, nor could they by any act or neglect of their own release themselves from the obligation to ascertain the amount of purchase-money and complete the transaction by payment. The right of the owner (the respondent), on the other hand, was to compel the company to ascertain the amount of purchase-money or compensation and pay it when ascertained.

I pass over the intermediate proceedings down to the 6th of July 1880. It is clear all throughout that the company was desirous to come to an arrangement, and the respondent determined to baffle any settlement save on the one basis of taking *all* his land. The possession taken by the company on that day under sect. 85 was a lawful possession. It was a lawful entry on the land to use it for the construction of their railway thereon. Pausing at this point, the case seems identical with *Salisbury* v. *Great Northern Railway Company* (1). There is so far no practical distinction between the two cases. Fry J. adopts the decision in that case, and I am not certain that the Court of Appeal intended to question it, although the Lord Chancellor does say, "For a company to enter, under the 85th section, on the eve of the expiration of all its general powers applicable to the land upon which it so enters—not for the purpose of making any statutory works under the statutory powers, but for that of acquiring a possessory title to the land against the landowner, and then making a railway over it, not under the Act, but as under an ordinary landowner's title, is, in my opinion, an abuse of the Act." It is not necessary to criticise that position.

Notwithstanding what was said in the Court of Appeal I am clearly of opinion that the entry of the company under sect. 85 was in fact bonâ fide and was also lawful, and that from that moment the company was in lawful possession of the land with a real interest in and a right to use it for the purpose of making and maintaining their railway on it. The principle involved in the decision in *Salisbury* v. *Great Northern Railway Company* (1) goes fully to that extent.

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(1) 17 Q. B. 840.

It is said, however, that even if the entry and user were lawful the possession of the company became unlawful immediately on the expiration of the five years mentioned in sect. 40 of the special Act. This result is reached by an interpretation of sect. 40 so very wide, carrying with it consequences so inconvenient, that we ought not to adopt it unless coerced to do so by the language of the section. Some of the mischiefs have been already forcibly pointed out.

The position taken by the Court of Appeal is this, that as all the statutory powers given to the company, including the power to use under sect. 85, were so given to them in relation to the making and completing the line of railway, it follows that after the lapse of the period of five years they could exercise no statutory power whatever in relation to the then uncompleted portion of the line. I am unable to accept that interpretation. Sect. 40 of the special Act does not embrace all the powers of the company. It does not refer to the power to take land for extraordinary purposes contained in sect. 38, nor to the powers for compulsory purchase provided for by sect. 39, nor does it take from them the power, nor relieve them from the obligation, to complete the purchase begun by their notice to treat and followed by a lawful entry and user under sect. 85 of the Lands Clauses Act.

Sect. 40 of the special Act is capable of another and more reasonable interpretation which, if necessary, I should be prepared to adopt, viz., that after the lapse of five years the statutable powers of the company, if any, for structural purposes shall cease to be exercised as to the uncompleted portion of the undertaking. By powers for structural purposes I mean powers, if any, for the making of the railway and "in relation thereto" as, for instance, such powers as are conferred by the Railways Clauses Act of 1845, and enable the company acting within its powers in the construction of the railway to affect the rights of third parties, such as by the alteration of brooks or streams, the making of drains or conduits into or through adjoining lands, power to

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(1) 17 Q. B. 840.

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obtain materials and such powers as are conferred by sect. 41 of the special Act. This interpretation of sect. 40 preserves the interests of both parties and does not take away or diminish the landowner's security.

If the possession of the company and their use of the land was lawful up to the 19th of July I revert to the question, What made it unlawful after that? The answers given by the noble and learned Earl and by the noble and learned Lords (Lord Watson and Lord Bramwell) to this question are to me quite satisfactory, and it would be but useless repetition to go over the same ground. I entirely agree with them and think that the judgment of Fry J. was right and should be reinstated.

Order of the Court of Appeal reversed; order of Fry J. restored; costs in the Court of Appeal and in this House to be paid by the respondent; cause remitted to the Chancery Division.

Lords' Journals 25th March 1884.

Solicitor for appellants: *R. R. Nelson.*
Solicitor for respondent: *C. M. Stretton.*

[HOUSE OF LORDS.]

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May 23.

ADAM MURRAY . . . . APPELLANT;

AND

ROBERT WILLIAM ALEXANDER SCOTT, JOSEPH WHITTLE, AND JOHN SCOTT } RESPONDENTS.

WILLIAM AGNEW AND HARRIETTE BIRCH . . . . } APPELLANTS;

AND

ADAM MURRAY . . . . RESPONDENT.

WILLIAM BRIMELOW . . . . APPELLANT;

AND

ADAM MURRAY . . . . RESPONDENT.

Building Society—Borrowing Powers—Unlimited Power of Borrowing—Deposit of Deeds—Preference Shares—Priorities in Winding-up—Certificate of Barrister—6 & 7 *Wm.* 4 *c.* 32.

A benefit building society, enrolled under 6 & 7 Wm. 4 c. 32, by its 32nd rule authorized the directors from time to time, as occasion might require, to borrow any sums of money at interest from any persons; the borrowed money to be a first charge upon the funds and property of the society.

Under this rule the directors borrowed large sums for the proper purposes of the society, and deposited with the lenders, as security, title deeds of properties which had been mortgaged to the society by advanced members:—

Held, reversing the decision of the Court of Appeal, that the rule was valid, and that the lenders were entitled in the winding-up to payment out of the assets, after satisfaction of the outside creditors, and in priority to the claims of all shareholders or members; but that the lenders must give up their securities to the official liquidator, the claim to special equitable charges upon specific properties being inconsistent with the true meaning of the rule, which was that all the moneys borrowed under it were to have the benefit, equally and pari passu, of a first charge upon the general funds and property.

Lord Hatherley's dictum in *Laing* v. *Reed* (Law Rep. 5 Ch. 8) as to an unlimited power of borrowing, overruled.

The 31st rule authorized the board to issue deposit or paid-up shares for £30 each at 5 per cent. interest with the right of withdrawing the whole or part of the deposit upon notice in preference to all other shares.

This rule was struck out by the certifying barrister, but the directors printed and acted upon it by issuing shares accordingly. Some years

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afterwards the rule was amended, by altering £30 into £1, and the amendment was certified by the barrister; and those who had taken £30 shares had them exchanged for £1 shares, and other £1 shares were issued to new shareholders. The moneys paid by these shareholders were applied for the purposes of the society:—

Held, affirming the decision of the Court of Appeal, that such shareholders, whether they had become so before or after the amendment was certified, and whether they had given notice of withdrawal or not, were entitled to be paid in the winding-up in preference to the unadvanced members.

THESE three appeals from orders of the Court of Appeal were heard together. They arose out of claims made in the winding-up of the Guardian Permanent Benefit Building Society. *Murray* v. *Scott* was an appeal from the decision in *Scott's Case;* and *Agnew* v. *Murray* and *Brimelow* v. *Murray* were in substance though not in form appeals from the decision in *Calvert's Case;* see *In re Guardian Permanent Benefit Building Society* (1).

The society was founded in 1870, and enrolled under 6 & 7 Wm. 4 c. 32, and was never incorporated under the Building Societies Act 1874. The material parts of the rules were as follows:—

Sect. 1. This society shall be denominated The Guardian Permanent Benefit Building Society. Its object is to realize, by monthly subscriptions, fines, interest, and other payments, and the accumulations thereof, £120 for each share, and £60 for each half-share; to be advanced to the members of the society for the erection of buildings or purchase of real or leasehold estates, on mortgage of such buildings or estates, or paid upon the terms and in the manner hereinafter mentioned.

Sect. 5. The society shall consist of any number of members, each subscribing for any number of shares or half-shares. At the meeting in every calendar month each member shall pay a subscription of ten shillings for every share, and five shillings for each half-share held by him in the society, until such share or half-share is realized in accordance with the tables hereunto annexed, or withdrawn. He shall also from time to time pay any fines payable by virtue of these rules, and also the amount of any levy which may from time to time be made for the contingent fund. Members may pay up in advance any number of shares or half-shares in accordance with unadvanced shares table No. 2. The first subscription shall be due on the 4th of January 1870, and the subsequent subscriptions at each monthly meeting successively. The value of each share at any date from the commencement of the subscription in respect thereof shall be in accordance with the tables hereunto annexed, save that no interest shall be allowed in respect of any share or half-share (except paid-up shares or half-shares) withdrawn within twelve months from the time of entry.

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(1) 23 Ch. D. 440.

Sect. 20 provided for advances to members desiring them.

Sect. 31. The board for the time being shall have power, as circumstances may require, to issue deposit or paid-up shares of the value of £30 each, upon a certificate bearing interest, after the rate of £5 per centum per annum, and such certificate shall entitle the depositor (after one month's notice, in writing, to be reckoned from a monthly meeting) to withdraw the whole or part of his deposit in preference to all other shares. The form of certificate shall be the same as set forth in the schedule to these rules.

Sect. 32. The trustees or directors for the time being of this society may, from time to time, as occasion may require, borrow and take up at interest any sum or sums of money from the society's banker, or from any banker, or from any other person or persons; and any borrowed money shall be a first charge on the funds and property of the society. And in case the trustees or directors shall at any time give their joint and several promissory note or other security for money borrowed for and on behalf of the society, then and in such case the persons giving the security shall be indemnified by the society, and the funds and property of the society shall be held subject and liable to the repayment of the borrowed moneys; the borrowed moneys being always deemed a first charge on the society's funds and property.

Sect. 35. DEDUCTION ON ADVANCES AND WITHDRAWALS.—One pound shall be deducted from each share when any advance is made. And also the twentieth part of the interest shall be deducted when any shares shall be withdrawn. These amounts, together with all moneys received for rules, reports, fines, interest,

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&c., shall be placed to the credit of this fund; and all expenses for printing, rent, salaries, postages, &c., shall be paid from this fund.

Sect. 36. If, after the expiration of three years, the board shall consider that the contingent fund has increased to an amount more than sufficient to cover the risk to which the society is exposed from the insufficiency of securities taken or otherwise, they shall decide what amount shall be retained to cover such risk, and the overplus shall be divided amongst all the shareholders, depositors, and borrowers by adding a percentage to the amount of interest gained by each share. A similar division shall from time to time be made when and so often as the board shall deem expedient; but no money to be paid to a member until his share is realized or withdrawn.

Sect. 37. If a loss should arise which the contingent fund is insufficient to make good, or if for any other reason the board should at any other time deem an augmentation of the contingent fund to be necessary or expedient, the board shall at once direct a levy of such a sum on and from every share or shares, half-share or half-shares, advanced and unadvanced, as will cover all deficiency, or as the board may consider necessary for other purposes of the contingent fund.

Sect. 41. Any member may withdraw unadvanced shares on giving one clear month's notice; the amount payable on withdrawals shall be determined by the said tables. All unadvanced shares which, according to the said tables, shall have accumulated to the full value of £120, shall be considered due and payable on demand. Withdrawals shall be payable in rotation, according to the priority of notice. The board may limit the number of withdrawals to be paid off in any one month.

The copy of the rules forwarded to the barrister appointed to certify the rules of savings' banks, under the provisions of the Act, contained sect. 31; but the certifying barrister struck it out and certified the remainder. The rules however were printed retaining sect. 31, and there was added in sect. 37 of the rules the words "Provided nevertheless that no levy of any sum shall be made on, from or in respect of any deposit or paid-up shares mentioned or referred to in sect. 31 of these rules." The rules, retaining sect. 31 and the additional words in sect. 37, were printed before the same were certified, and were delivered before and after the same were certified to members who applied for the same as if sect. 31 and the additional words in sect. 37 in such copies had been duly certified.

The fact of sect. 31 never having been duly certified only became known to the respondents in *Murray* v. *Scott* at the appointment before the registrar for the adjudication on claims held on the 20th February 1882.

Certain alterations were made by the society in the rules in June 1876, and were certified. In sect. 31 £1 was substituted for £30, and in pursuance of this alteration new deposit share certificates for shares of £1 each were issued to all deposit shareholders, to the aggregate nominal amount of the certificates for £30 shares then held by each of the deposit or paid-up shareholders respectively.

On the 14th of November 1881, an order was made by the Chancery Court of the County Palatine of Lancaster to wind up the society under the Companies Acts 1862 and 1867, and on the 24th of November 1881 Adam Murray (the appellant in the first appeal and respondent in the other two) was appointed official liquidator.

The facts material to this report are taken from statements agreed upon in the winding-up between the official liquidator and the respective parties concerned in the three appeals, and are as follows:—

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The respondents were holders of deposit or paid-up shares under rule 31, obtained in the following manner. R. W. A. Scott, in 1874 and 1875, paid in full and obtained certificates for ten deposit shares of £30 each. The certificates for all the above shares were subsequently changed for 300 certificates of £1 fully paid-up deposit shares. In 1878 he paid in full and obtained certificates for 300 deposit shares of £1 each, and became thus the holder of in all 600 deposit shares of £1 each fully paid. In May 1881 he gave notice of withdrawal of £100, part of the above £600, and on account of this the society paid him £50. In

August 1881 he gave notice to the society of his intention to withdraw the balance of the entire moneys paid by him to the society on account of his shares. The balance of such moneys was never paid to him, and he claimed £550 and interest.

Josiah Whittle was the holder of 973 fully paid up deposit shares in the society of £1 each, all of which he acquired between October 1877 and March 1880. He gave notice of withdrawal of the entire amount paid by him to the society in respect of his shares in July 1881. He was not paid the amount he claimed, and he claimed £973 and interest.

John Scott was the holder of 300 fully paid-up deposit shares of £1 each, all of which he acquired after April 1875. Of such shares a portion were originally issued as £30 shares and the certificates subsequently changed for certificates for £1 shares. The residue of such shares were issued as £1 shares. He had never given any notice of withdrawal, and claimed £300 and interest.

The form of certificate for deposit or paid-up shares of £30 each annexed to the rules as provided by rule 31, contained the words, "to be withdrawn by giving one calendar month's notice in writing to the secretary prior to any monthly meeting." All certificates issued for deposit or paid-up shares of £1 each contained the words, "to be withdrawn in preference to ordinary investing shares by giving, &c."

Each of the said sums of £600, £973, and £300, were duly paid into the account of the society at the Consolidated Bank, Manchester. At the respective times when these payments were made such account was in each case overdrawn to an extent considerably in excess of the respective sums so paid in, and the sums were applied in the ordinary course in reduction of the debit balance on the account. The account of the society with its bankers was always since the formation of the society overdrawn.

R. W. A. Scott, J. Whittle, and J. Scott, claimed to be paid out of the assets of the society in priority to the unadvanced shareholders, and their cases were by consent taken as test cases.

The Court of Appeal (Jessel M.R., Cotton and Bowen L.JJ.) made an order on the 20th of December 1882, discharging the order of the Vice-Chancellor of the County Palatine and declaring that R. W. A. Scott, Josiah Whittle, and John Scott, were members of the society, and entitled in priority to members who were not holders of deposit or paid-up shares, to payment (out of the assets of the society remaining after payment of the costs of the winding-up of the society, and of the sums due in respect of debts legally recoverable against the society, and interest on such of the said debts as by law carry interest) of the sums respectively claimed by them with interest from the 2nd of November 1881, to the date of payment, at £5 per cent.

The effect of the order of the Vice-Chancellor, his judgment, and the judgment of the Court of Appeal, in *Scott's Case* are to be found in the report of *In re Guardian Permanent Benefit Building Society* (1). This appeal was from the order of the Court of Appeal in *Scott's Case.*

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After stating the rules the agreed statement of facts proceeded as follows:—

4. Soon after its formation the society began to issue advertisements inviting the public to make advances to it.

5. The society also issued yearly reports of the position of the society, which reports contained the following announcement:—

> "The society also receives sums of money as loans, a clause to this effect being certified in the rules by the Government Registrar, the interest on which is paid half-yearly. To benefit societies or private individuals having sums of money to put out at interest this society provides both a safe and lucrative mode of investment."

The rule referred to in such report is the 32nd, and in pursuance of such rule the trustees of the society borrowed from various persons large sums of money for the purposes of the society from time to time.

6. Each of such reports also contained a cash account which cash account included the amount received during the year as "loans" and the amounts paid as "loans, interest and subscriptions repaid."

7. The reports contain also a "general balance" which shewed

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(1) 23 Ch. D. 440, 453-472.

as a liability of the society the "amount of loans" due, and such reports also contained under the separate headings of "amount due to shareholders" "amount of deposit shares" and "amount of loans" details of the society's liabilities. The initials of the various persons who had lent money under the 32nd rule together with the amounts due to each are set forth in such reports. Such reports were furnished to all the members of the society who applied for them. Copies of such reports are entered in the minute book of the society which minute book and reports are intended to be referred to as part of this statement.

8. In October 1875 William Birch advanced to the society £2000, and received, as a security for the same sum and interest at the rate of 5 per cent. per annum, certain title deeds relating to properties which were then in mortgage to the society. A promissory note for the said sum and interest at the rate of 5 per cent. per annum was signed by the trustees and directors for the time being of the society or some of them, and delivered to William Birch.

9. In January 1876 William Birch advanced the further sum of £600 to the society, and received the promissory note of the trustees and directors for the time being or some of them for the same sum and interest at the rate aforesaid, and certain title deeds relating to other properties then in mortgage to the society were delivered to William Birch as security.

10. In September 1877 a further sum of £600 was advanced in like manner by William Birch, and he received a similar promissory note and certain title deeds relating to other properties then in mortgage to the society as security for the same.

12. William Birch died, leaving William Agnew and Harriette Birch his executors and devisees.

13. All the said sums together with interest from the 1st of January 1881 remain unpaid, and W. Agnew and H. Birch hold as security for the same title deeds of properties in mortgage to the society.

14. All the said sums were paid to the credit of the banking account of the society at the Consolidated Bank, Manchester. At the time of such payments respectively the account was overdrawn to an amount exceeding the amount so paid in respectively.

And the sums so paid in were applied in reduction of the overdraft in the usual manner.

15. The assets of the society now consist of the sums due from advanced members of the society on mortgage amounting to £81,500 or thereabouts, and other assets estimated by the liquidator at a value not exceeding £20.

The properties mortgaged as security for the sum of £81,500 are with two or three exceptions in possession of the official liquidator on behalf of the society as mortgagees in possession. The value of the said properties is insufficient to repay the amounts owing upon them to the society. It is impossible to estimate with accuracy what sum would be realized therefrom in case of sale, but it is practically certain that a serious loss must be made thereon.

16. Of the sum of £81,500 due to the society on mortgage as aforesaid, deeds and securities for sums amounting to £39,185 5*s.* 4*d.* or thereabouts (inclusive of the deeds deposited, the subject of this statement) have been deposited with and are held by persons having lent money to the society in a similar manner to William Birch. Part of the moneys comprised in the sum of £81,500 has been advanced since 1874.

17. The amount of liabilities claimed against the society by persons who are not members is £229 10*s.* 5*d.*, exclusive of the amounts claimed by persons who have advanced money to the society by way of loan.

18. The amount claimed by persons who have advanced money by way of loan as aforesaid (including persons who like W. Agnew and H. Birch hold securities of the society on deposit) is £58,907 or thereabouts.

19. Of such claims certain of them amounting to £7,173 12*s.* 4*d.* stand on a different footing from the remainder. The claims of persons holding securities of the society on deposit including W. Agnew and H. Birch amount to £21,088 or thereabouts.

20. The amount claimed by unadvanced shareholders in respect of their shares is £7,413 2*s.* 11*d.* or thereabouts. Of this sum the official liquidator proposes to admit the sum of £3,416 5*s.* 7*d.*, but the persons who have advanced money by way of loan as aforesaid claim to be paid out of the assets of the society in priority to such members.

21. There are also a number of persons who claim to be deposit or preference shareholders of the society under the 31st rule and whose claims in respect of moneys deposited with or alleged to be lent to the society amount in the whole to £14,282 12*s*.

22. W. Agnew and H. Birch gave notice to the society in writing on the 16th of March 1881 to repay the said sums of £2000, £600, and £600, but such sums still remain unpaid.

23. The persons who signed the promissory notes which were delivered to William Birch have filed petitions for liquidation of their affairs by arrangement (except Ebenezer Turnbull, who is dead and whose estate is being administered in this Court and is insufficient to answer the amount of the promissory notes signed by him).

24. No dividends have been paid out of the estates of any of the persons who signed the notes except in one case and that for a very small amount.

On the 13th of February 1884 the Vice-Chancellor of the County Palatine, following the decision of the Court of Appeal in *Calvert's Case* (1), made an order upon the claim of W. Agnew and H. Birch, the material parts of which were as follows:—

Declaration, that notwithstanding rule 32 of the certified rules of the society, the borrowing of moneys by the society or by trustees or directors or officers thereof on behalf of the society was ultra vires and invalid, and created no liability as against the society in liquidation or the members or assets thereof. Order that W. Agnew and H. Birch deliver up to the official liquidator all deeds and documents in their custody possession or power relating to certain properties mortgaged to the trustees on behalf of the society. But it appearing to the Court that the society or the members thereof have had the benefit of the advances, and that the assets of the society as now subsisting may in part represent or may have been acquired by means of such advances, this Court doth declare that subject to and after the payment in full in the first place of the costs of the winding up of the society and in the second place of the debts of creditors of the society (including persons who during the interval between the 2nd of November 1874 and the 22nd of April 1875 inclusive advanced moneys to the society or the officers thereof on behalf of the society and whose claims remain unsatisfied) together with interest on such debts at the rate of £5 per cent. per annum to the time of actual payment, and in the third place of the amounts due to investing members and shareholders respectively of the society together with interest thereon at the rate of £5 per cent. per annum to the time of actual payment according to the rules of the society, the assets of the society or the balance thereof (if any) ought to be applied in payment to W. Agnew and H. Birch, and all other persons having lent moneys to the society or the trustees thereof at times other than during the said interval from the 2nd of November 1874 to the 22nd of April 1875 and whose claims remain unsatisfied, of a dividend or dividends pari passu and pro ratâ upon the sums advanced by them respectively for principal and not repaid.

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(1) 23 Ch. D. 440, 450.

This order was affirmed by an order of the Court of Appeal of the 20th of February 1884.

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The appellants represented W. Mycock who had in May and June 1874 lent moneys to the society under the 32nd rule and received securities under circumstances similar to those set out in *Agnew* v. *Murray*, except that the moneys were all lent in May and June 1874, and this appeal was intended to raise the question of the effect of the Building Societies Act 1874 upon such loans. This case (when before the Vice-Chancellor of the County Palatine) was called *Birtles' Case* and is so referred to in the judgment of Lord Blackburn in this House. The Vice-Chancellor on the 12th of June 1882 made an order similar to the order he made in *Calvert's Case*. On the 19th of December 1882 the Court of Appeal (Jessel M.R. and Cotton and Bowen L.JJ.) made an order which varied the order of the Vice-Chancellor in *Birtles' Case* and was similar to the order of the Court of Appeal of the 20th of February 1884 in *Agnew* v. *Murray* above set out.

The appeals in *Agnew* v. *Murray* and *Brimelow* v. *Murray* were in substance (though not in form) appeals from the decision of the Court of Appeal in *Calvert's Case*. The judgments of the Vice-Chancellor and of the Court of Appeal in *Calvert's Case* are to be found in the report of *In re Guardian Permanent Benefit Building Society* (1).

April 24, 25, 28, 29. *W. Ambrose* Q.C. and *A. C. Maberly* (*Edwyn Jones* with them) for the appellant in *Murray* v. *Scott*:—

The respondents in this appeal, who are deposit or paid up shareholders under rule 31, are not shareholders or members, rule 31 being invalid for want of a certificate from the barrister. The certifying of rules for friendly societies is regulated by 10 Geo. 4 c. 56 ss. 4 and 7, and 4 & 5 Will. 4 c. 40 ss. 3, 4, incorporated into 6 & 7 Will. 4 c. 32 by s. 4. There having been no certificate of the original rule, the certificate of the amendment was invalid. Even if the rule had been certified it was a mere device to borrow without limit and was therefore bad. The respondents are in fact persons who have advanced moneys to a society which had no power to borrow, and must be treated accordingly, and if not excluded altogether, at least postponed to ordinary members. That such a society had not an unlimited power to borrow was the opinion of Lord Hatherley in *Laing* v. *Reed* (2), and this is the effect of the decisions in *Hill's and Jones' Cases* (3); and in *In re National Permanent Building Society, Ex parte Williamson* (4): see also *Chapleo* v. *Brunswick Permanent Building Society* (5), *In re Professional, &c., Building Society* (6), and *Blackburn Building Society* v. *Cunliffe* (7). The power of unlimited borrowing is void; it may be used for purposes other that those sanctioned by the legislature. The limited nature of the powers of such societies was recognised in *Dobinson* v. *Hawks* (8), and in *In re Kent Benefit Building Society* (9).

Cozens-Hardy Q.C. and *H. B. Buckley* for the respondents in *Murray* v. *Scott*:—

The order now under appeal holding that the respondents are members is right. If however, the House should reverse the decision of the Court of Appeal in the other two appeals and hold that the unlimited power of borrowing is valid, the favourable position of the present respondents is turned into a very unfavourable one, as they will then be postponed to creditors under sect. 32, and there are not enough assets to pay both classes. There is nothing in the rules inconsistent with the respondents' position as established by the decision of the Court of Appeal, and they rely on that judgment. Their position is matter of contract between the members of the society as to their mutual rights; their right to make such contracts by the rules being unfettered by the legislature. The amended rule having been certified the rule is valid, but even if not certified sect. 31 is binding, since it has been acted on by all the members as a binding rule and has been recognised by every one.

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(1) 23 Ch. D. 440, 444–452.

(2) Law Rep. 5 Ch. 4, 8.

(3) Law Rep. 9 Eq. 605, 618, 619.

(4) Law Rep. 5 Ch. 309, 312.

(5) 6 Q. B. D. 696.

(6) Law Rep. 6 Ch. 856, 861.

(7) 22 Ch. D. 61.

(8) 16 Sim. 407.

(9) 1 Dr. & Sm. 417.

H. Davey Q.C. and *Alfred Hopkinson* for the appellants in *Agnew* v. *Murray*, and *Brimelow* v. *Murray*:—

The appeal in *Agnew* v. *Murray* raises the question as to the validity of rule 32, unincumbered by the question of the effect of the Building Societies Act 1874, s. 15, and the Building Societies Act 1875. The appeal in *Brimelow* v. *Murray* also raises the question of the validity of rule 32, but the loans in that case having been made in May and June 1874 were (it is contended) made valid by the Building Societies Act 1874 (37 & 38 Vict. c. 42) ss. 8 & 15, and were not invalidated by the Act of 1875 (38 Vict. c. 9) s. 1. Upon the general question under rule 32 the decision of the Court of Appeal, in holding that the power of unlimited borrowing is void, is wrong. That decision was given without any serious argument; it being erroneously assumed that the point was settled. In *Blackburn Building Society* v. *Cunliffe* (1) the rules gave no power to borrow; that case does not decide the present point, or touch the argument that where there is express authority to borrow in the rules the borrowing is valid. If this is not so the certificate of an official authorized by the legislature is a trap for unwary lenders. The certificate even if per incuriam it covered some thing contrary to law would be conclusive upon all matters incidental to the purposes of the society: *Dewhurst* v. *Clarkson* (1); at all events as between the members, unless perhaps it authorized the carrying on of a different business: see *Kelsall* v. *Tyler* (2) which is the only other case on the subject except *Laing* v. *Reed* (3), in which Lord Hatherley's dictum saying the certificate would not be conclusive, was erroneous. That dictum was unnecessary and extra-judicial. It would be very hard if bankers could not recover moneys they had lent the society by overdrafts for advances to members for the purposes of the society.

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(1) 22 Ch. D. 61.

A mere borrowing power is not outside the scope of the society, and there is no difference in principle, though there may be in expediency, between a limited and an unlimited power. The question of amount is for the Registrar. Who is to fix the limit? What is reasonable in one case might be unreasonable in another. So long as borrowing is not forbidden by the legislature the mode and amount are for the society to determine. That such a power may be abused is no argument against its use.

What was assumed by the Court of Appeal to be settled law is not decided in any case; the point was not raised in *Blackburn Benefit Building Society* v. *Cunliffe* (4), nor in any case except in *Hill's and Jones' Cases* (5) before Malins V.C., where the rules gave no power to borrow from strangers. If a limited power is valid, logically an unlimited power must be so. In *Chapleo* v. *Brunswick Permanent Building Society* (6) the borrowing powers had been exceeded and the society derived no benefit from the loan in question. In *Wilson's and Davis' Cases* (7) Bacon V.C. held that the Society had borrowed for purposes other than the proper purposes of the society; and in the Court of Appeal the present point was not raised. In *Moye* v. *Sparrow* (8), James V.C. held that the loans were not justified, because not made for the purposes of the society as specified in the rules. Apart from authority it cannot be said that borrowing is so far outside the scope of a building society that a society having power to borrow is of a different class from that authorized by the Act of 6 & 7 Will. 4 c. 32. There is no express power given by that Act; but this is not necessary. This has been held as to a power to buy land, provided that it is bought for the purposes of the society as a building society; see *Mullock* v. *Jenkins* (1); in *Grimes* v. *Harrison* (2) this distinction was taken. As to the position inter se of creditors under rule 32, who have special securities (sub-mortgages) and those who have not, the rule giving to all such creditors a first charge on the funds and property of the society, must not be held to interfere with the exercise by the society of a power of giving special securities any more than with its ordinary powers of managing the business. The rule was not intended to affect right of creditors under it inter se, but to give them priority over general creditors and members: see *In re Patent File Company* (3); *In re Florence Land Company* (4); and *In re Colonial Trusts Corporation* (5); Buckley on Companies 149 (4th ed.) where the cases are collected; and see *Gardner* v. *London Chatham and Dover Railway Company* (6).

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(1) 3 E. & B. 194.
(2) 11 Ex. 513.
(3) Law Rep. 5 Ch. 7, 8.
(4) 22 Ch. D. 61.
(5) Law Rep. 9 Eq. 605.
(6) 6 Q. B. D. 696.
(7) Law Rep. 12 Eq. 516; 7 Ch. 45.
(8) 18 W. R. 400.

Next, assuming the power to be altogether invalid, what are the rights of those who have lent? They have no power to recover money lent from the borrower, but may claim to treat the mortgages as a transfer to them of the securities, and to have the securities realized. If the securities are insufficient they have a claim on the general assets, but according to the Courts below they are held to rank below the members. It is contended that they should rank before members, or at least pari passu. As to the general creditors the amount due to them was very small, and no objection in fact is made to their being paid in full, as ordered by the courts below; but as a matter of principle the appellants do not admit their right to priority. The assets of the society have been created in certain proportions by contributions from three classes; lenders under sect. 32, preference shareholders under sect. 31; and unadvanced members. *Pennell* v. *Deffell* (7) held that *Clayton's Case* (8) applied but was overruled by *Knatchbull* v.

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(1) 14 Beav. 628.
(2) 26 Beav. 435.
(3) Law Rep. 6 Ch. 83.
(4) 10 Ch. D. 530.
(5) 15 Ch. D. 465.
(6) Law Rep. 2 Ch. 201.
(7) 4 D. M. & G. 372.
(8) 1 Mer. 572.

Hallett (1) on that point. Lenders under sect. 32 ought to be paid in priority or at least pari passu with members.

1. They are entitled to priority. They paid their money to the society and the society received it in consideration of the lenders getting valid equitable mortgages. They did not get their consideration, but have a right on the implied contract arising from a failure of consideration as money had and received, or as equitable creditors to the extent to which the society has used the money: *Western Bank of Scotland* v. *Addie* (2), *Houldsworth* v. *City of Glasgow Bank* (3), *Diggle* v. *Higgs* (4), *Phœnix Life Assurance Company* (5), *Chapleo* v. *Brunswick Building Society* (6), per Baggallay L.J. 2. The society is not a corporation, but only nomen collectivum for a number of individuals, and though it may be that as between themselves or as between the society and strangers the society could not rely on rules not properly made or not certified, yet as against the society, at any rate to the extent to which it claims benefits out of the assets under the rules, the rules must be held valid in favour of strangers when they are known and acquiesced in by every individual member of the society: see Agriculturist's Cattle Assurance Company's Cases, *Spackman* v. *Evans*, *Evans* v. *Smallcombe*, *Houldsworth* v. *Evans* (7), *Phosphate of Lime Co.* v. *Green* (8). 3. It is true that the assets cannot be followed because not ear-marked, but on the principle of contribution to creation of the assets, can it be said that members have a better right to get back what they have contributed to a common heap than the creditors? The true principle would be a proportional or pari passu division.

If rule 32 is valid it is not necessary to discuss the special question in *Brimelow* v. *Murray*. If it is invalid then the loans in *Brimelow* v. *Murray* having been made in May and June 1874 were by the effect of the Act of 1874 (37 & 38 Vict. c. 42) ss. 8 and 15 declared valid. The Act of 1875 (38 Vict. c. 9) s. 1 repealed sect. 8 of the Act of 1874, but expressly provided that such repeal should not affect anything "done or suffered" in pursuance of sect. 8 before the passing of the Act of 1875. "Suffered" means permitted, and those words protect lenders who permitted their loans to remain, as was the case in *Brimelow* v. *Murray*.

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(1) 13 Ch. D. 696.
(2) Law Rep. 1 H. L. (Sc.) 145.
(3) 5 App. Cas. 317.
(4) 2 Ex. D. 422.
(5) 2 J. & H. 441.
(6) 6 Q. B. D. 696, 711.
(7) Law Rep. 3 H. L. 171, 247, 263.
(8) Law Rep. 7 C. P. 43.

Ambrose Q.C. and *Maberly* (*Edwyn Jones* with them) for the respondent in *Agnew* v. *Murray* and *Brimelow* v. *Murray* :—

Rule 32 is invalid for the reasons already given in the argument in *Murray* v. *Scott*. Parliament never intended in 1836 that these societies should borrow at all. If not authorized by the Act of 1836 then the society is prohibited by the Companies Act 1862 s. 4 as a society consisting of more than twenty persons carrying on business for the acquisition of gain. As to specific securities, the rules are inconsistent with such securities being given to lenders. As to the argument on the assumption that sect. 32 is invalid, it is admitted that there is no proof that the money has been applied in discharging valid claims against the society so as to bring them within the principle of *In re Cork and Youghal Railway Company* (1), and *In re German Mining Company* (2). The members have a legal right to what they claim under the rules. Creditors under sect. 32 have equitable claims subject to the members' legal rights, since it would be inequitable for members to take advantage of money contributed under a common mistake.

The House took time for consideration.

May 23. EARL OF SELBORNE, L.C. :—

My Lords, the principal question on these appeals is as to the validity of the 32nd rule which authorizes the trustees or directors of the Guardian Permanent Benefit Building Society to borrow money "from time to time, as occasion may require," without any limitation of the amount to be so borrowed; but with the provision that "any borrowed money shall be a first charge on the funds and property of the society." The words, "as occasion may require," when read in connection with the rest of the rules

(1) Law Rep. 4 Ch. 748.

(2) 4 D. M. & G. 19.

necessarily mean, when and as there may be occasion to borrow money for the purposes and objects of the society, as defined by rule 1. Any borrowing for other purposes, or other objects, would be a breach of the duty of the trustees or directors under those rules, and certainly cannot be taken to be authorized by the terms of the 32nd rule. In point of fact no money was borrowed or applied for any unauthorized purpose.

The 32nd rule has all the force and authority which it can derive from the mutual contract and agreement of the members of the society, and from the certificate and allowance of the barrister appointed for that purpose under the Friendly Societies Acts, incorporated (by reference) into the Act 6 & 7 Will. 4 c. 32, under which this society was formed. Unless, therefore, it was illegal and ultrà vires for the members of such a society to make, and for the barrister to allow and certify such a rule, the debts contracted by virtue of it are well charged upon the general funds and property of the society, and ought to be allowed and provided for out of such funds and property, in priority to the shares and interests of all classes of members.

The Vice-Chancellor of the Duchy of Lancaster and the Court of Appeal considered it to have been settled, by authorities which they ought to follow, that any rule of such a society formed under the Act of 6 & 7 Will. 4, by which borrowing money without some limit of amount was authorized, was repugnant to and inconsistent with the provisions of that statute, and therefore incapable of being made legal by any consent of members or allowance of the certifying barrister. But when the authorities which were supposed to establish this proposition are referred to, none of them are found to be really decisions upon that point; they all seem to depend upon a dictum of Lord Hatherley in the case of *Laing* v. *Reid* (1), to the effect that although a limited borrowing power, if expressly given by a rule duly certified, would be good (as was decided in that case), a rule authorizing the trustees "to raise an unlimited sum of money wholly regardless of the contributions which might be made by the members," would be "contrary to the intent and scope of the Act." I am not sure in what sense these words, "wholly regardless of the contributions," &c., were meant by Lord Hatherley to be understood; but I subscribe to the doctrine laid down in the same case by Giffard L.J., that the test ought to be whether the rule, (not being contrary to any express prohibition in the statute), was one which made the society "a thing different from a benefit building society." If not, and if it "merely provided a method of conducting business," (i.e., the proper business of a benefit building society), it could not be illegal or ultrà vires; being made by the proper authority and certified in the proper manner.

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(1) Law Rep. 5 Ch. 4, 8.

Without disparagement to the weight justly due to those learned Judges, who in several later cases have referred, with apparent approval and concurrence, to Lord Hatherley's dictum, I think that in this state of authority the point cannot be regarded as settled; and that your Lordships ought to decide it according to your own view of the true effect of the statute.

Upon principle it seems clear, that if a borrowing power may be (as both Lord Hatherley and Giffard L.J. rightly, in my opinion, decided it to be) not only consistent with but reasonably conducive to the proper objects of a benefit building society, (though not so necessary as to be implied unless expressly given), it must be competent for the members of the society to make, and for the barrister to certify, a rule conferring such a power; and if it be contended that such a power could only be given under certain conditions and limitations, the law prescribing and defining those conditions and limitations must be in some way discoverable from the statute; otherwise the authority competent to give the power must also be competent to define its extent and to prescribe the conditions (if any) under which it is to be exercised. In the case of *Laing* v. *Reid* (1) the power was expressly limited, so that the money borrowed was at no time to exceed two-thirds of the amount for the time being secured by mortgages to the society; and the same limit has since been prescribed by law to societies within the later Act of 1874, by which rules giving borrowing powers are expressly authorized. But the subject is not in any way regulated, or even so much as mentioned, in the Act of 6 & 7 Will. 4, and the particular terms in which Lord Hatherley expressed himself in *Laing* v. *Reid* (1)

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(1) Law Rep. 5 Ch. 4.

Earl of Selborne, L.C.

were probably influenced by the circumstances of the case which he had then before him.

The only limitations of the general power to make rules and regulations conferred by the Act of Will. 4, upon the members of such societies, (beyond the necessity of having them certified), which are discoverable from the statute, are generally and equally applicable to all such rules and regulations. They must be (1) "wholesome rules and regulations for the government and guidance of the society;" that is, of a society formed for the purposes and in the manner defined by the Act; (2) not repugnant to any express provisions of the Act; and (3) not repugnant to the general laws of the realm. It cannot be alleged that the omission of the rule in question to prescribe any fixed or ascertainable limit of the amount to be borrowed, is repugnant to any express prohibition of the Act, or to any general law of the realm. Nor can it reasonably be contended that the word "wholesome" renders every rule or regulation (though agreed to by the members of the society and duly certified) void in law, if in the opinion of a court of justice it is of more or less questionable expediency, or not accompanied by all such checks and safeguards as a judge may think desirable for excluding the possibility of any abuse. The only real and true limit of the rule-making power, as to a matter not governed by the general law of the realm or by any express prohibition in the statute, must be that pointed out by Giffard L.J.; the power cannot be so exercised as to make the society a thing different from a benefit building society formed for the purposes and in the manner defined by the Act. It might have that effect if the rule authorized borrowing, or the use of money borrowed, for purposes other than those of a benefit building society as so defined; or, if it enabled the trustees or directors to pledge the credit of the individual members of the society without limit in a manner inconsistent with the limitation of the value and amount of the shares and subscriptions by which the common stock or fund of the society was to be raised as prescribed by the Act. But the rule now in question does neither of these things. It only authorizes borrowing "as occasion may require;" manifestly (as I have already said) for no other purposes than the proper purposes of the society, which appears by all the other rules to be a benefit building society as defined by the Act, and nothing else. And it does not authorize the trustees or directors to pledge in any way the personal credit of any individual members of the society (unless, indeed, they think fit, by way of security only, to pledge their own); it expressly makes all borrowed money "a first charge on the funds and property of the society," of which the base is necessarily the total amount of the contributions of members; and the creditors can have no recourse except against such funds and property. I am therefore of opinion that the 32nd rule of this society is valid in law, and that the appellants in *Brimelow* v. *Murray* and *Agnew* v. *Murray* are entitled to rank as creditors against the assets of the society in priority to the members thereof of all classes, including those represented by the respondents in *Murray* v. *Scott*; as to whom, the order which is the subject of that appeal of *Murray* v. *Scott* is in my opinion correct, and ought to be affirmed.

The only other point on which I think it necessary to say anything is as to the claim of the creditors represented by the appellants Brimelow and Agnew to special equitable charges upon certain properties mortgaged to the society, the title-deeds of which were deposited with them by way of security for the advances made by them under the 32nd rule. I think that this claim is inconsistent with the true meaning of that rule, which I understand to be, that all the moneys borrowed under it are to have the benefit, equally and pari passu, of a first charge upon the general funds and property of the society. If the directors could pledge particular assets of the society to particular lenders under that rule, the other lenders under the same rule would be deprived pro tanto of that first charge which the rule gives them; and the successive borrowing operations would have a different incidence upon the funds of the society from that intended and authorized. I therefore agree on this point (though for a different reason) with the reversal by the Court of Appeal, of the judgment of the Vice-Chancellor of the Duchy of Lancaster in *Calvert's Case* (1).

The several orders complained of by the appeals of *Brime-*

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(1) 23 Ch. D. 440, 450.

low v. *Murray* and *Agnew* v. *Murray* ought, therefore, in my opinion to be reversed, except so far as they direct the delivery up to the official liquidator of the deeds and documents therein respectively mentioned. For the rest of both those orders, there should be substituted a declaration to the following effect:— "That subject to and after payment in full of the costs of the winding-up of the society, including the costs of all the appeals to this House, and in the second place of the debts of the creditors of the said society, other than persons having advanced moneys to the society, the assets of the society should be applied in payment of all persons having advanced money on loans to the said society, or the trustees or directors thereof, whose claims remain unsatisfied; in full, if the assets are sufficient or if not of a dividend pari passu and pro rata. And that the surplus, if any, should be applied in payment of the amounts due to those members of the society who are represented by the claimants Scott; in full, if there be sufficient, if not in payment of a dividend pari passu, and rateably, in priority to the members who are not holders of deposit or paid-up shares; and the residue, if any, to the other shareholders."

With that declaration (which includes a provision for the costs of all three appeals) these cases should be remitted to the Court below.

LORD BLACKBURN:—

My Lords, the two appeals in which Murray is respondent involve the same question and may be treated as one. The appeal in which Murray is appellant raises a different question. All three appeals arise out of the same transaction. The Guardian Permanent Benefit Building Society was founded in 1870 as a building society. It was enrolled pursuant to the Act 6 & 7 Will. 4 c. 32. The society was on the 14th of November 1881 wound up in the Chancery of the County Palatine of Lancaster, and on the 24th of November 1881, Murray, the appellant in one of those appeals, and the respondent in the two others, was appointed official liquidator. If the mortgages given by the advanced members had produced the amount at which they were estimated when taken, the society would have been solvent. But it was apparent that there would be a deficiency, not even yet ascertained, but so great as to make it important to ascertain in what order the different claims on the assets of the society were to rank.

It was arranged, with the sanction of the Court of Chancery in the County Palatine, that test cases should be taken, and that statements of fact should be agreed upon. The Vice-Chancellor of the County Palatine first heard the cases relating to the various classes of persons claiming to be entitled as creditors for money lent to the society, and reserved judgment in five cases: *Calvert's Case* and *Birtles' Case*, which he rightly held to be undistinguishable, and *Hawkins' Case*, *Grimes'* and *Grocott's Case*. His judgment on those five cases was pronounced on the 12th of May 1882. In each of those cases he made an order.

There was an appeal by the liquidator, and the Court of Appeal made an important variation in the orders in *Calvert's* and *Birtles' Cases*. Birtles has since died, and the appeal by Brimelow, his representative, is in form by him only, against the order so made in *Birtles' Case*, but in substance and reality on behalf of all those represented by either Calvert or Birtles against the orders made in those cases.

In *Hawkins' Case* the Vice-Chancellor made an order which on appeal was reversed. There has not been any appeal to this House on the order of the Court of Appeal in *Hawkins' Case*. I do not make out how the orders in *Grimes'* and *Grocott's Cases* were dealt with, but there is no appeal to this House on the orders in those cases.

The Vice-Chancellor next proceeded to consider the disputes arising on a very peculiar state of facts. The case of the respondents in the case in which Murray is now appellant was selected as a test case. On the 12th of June 1882 the Vice-Chancellor of the county delivered his judgment and made an order in that case. This order was on appeal reversed, and the appeal in *Murray* v. *Scott* was by the liquidator against the order of the Court of Appeal in that case.

The parties thought it desirable to bring a representative case before this House, in which the important questions raised in *Calvert's* and *Birtles' Cases* were not mixed up with a much less important one, and Agnew and Birch, the personal representatives of William Birch, were selected for that purpose. An order was in February 1884 made in their case, which was affirmed by consent in the Court of Appeal on the 20th of February, 1884. And the appeal in *Agnew* v. *Murray* is against that order of the 20th of February 1884.

It does not appear to me to have been necessary to have this second appeal, but there is this advantage in it, that the statement of facts agreed on in *Agnew's Case* is more recent in date than the others; and the order made in that case shews what is the practical effect of the orders of the Court of Appeal as they now stand.

The appeal in *Murray* v. *Scott* stood first at your Lordships' bar, but the three appeals were heard together. Mr. Ambrose and Mr. Maberly were heard for the liquidator in all three appeals. Mr. Hardy and Mr. Buckley were heard for the respondents Scott in the first appeal. Mr. Davey and Mr. Hopkinson were heard for the appellants in the other two appeals. On the conclusion of the argument the further consideration of the appeals was adjourned sine die.

I have come to the conclusion that the orders made in the two cases of *Brimelow* v. *Murray* and *Agnew* v. *Murray* ought to be varied in the manner which the Lord Chancellor has stated, and that the order in the case of *Murray* v. *Scott* is right and should be affirmed, subject to the effect of the variation in the other orders, which will produce a great practical difference in the result.

Before giving my reasons I think it as well to mention some things. The small amount of debts due to outside creditors, a little more than £200, was, by agreement of all parties, ordered in the Vice-Chancellor's Court to be paid first, and as I understood from the statements at the bar, has actually been paid. It was not intended to appeal against this. In this case, it being of no practical or pecuniary importance to consider how far outside creditors should have priority over loan creditors, the point has not been discussed at the bar. I do not mean by saying this to throw any doubt on the propriety of that order as it is, but merely to point out that it is not necessary to express any opinion either way upon it.

All three appeals were brought for the benefit of the whole;

and by what seems a very reasonable arrangement, which I think your Lordships will sanction, the costs are to be paid out of the assets of the society. I take the facts and figures from the agreed statement of facts in *Agnew* v. *Murray* (1); I do not now read it, but refer to it as if it was read.

It was not explained what the claims, amounting to £7173 12*s.* 4*d.*, stated in the 19th paragraph to stand on a different footing from the remainder of the £58,907 were. I guess, though I do not know, that they were those represented by Hawkins, and the same as those mentioned in the order as being those "who during the interval between the 2nd of November 1874 and the 22nd of April 1875 inclusive advanced moneys to the said society." Assuming this to be so, and deducting the whole of this from the £58,907, the appellants in this case represent in round numbers £50,000; and if the order stands as it is, and those represented by the appellants are to come last, the whole loss, unless the unascertained but serious deficiency exceeds £50,000, which I should hope was improbable, must fall upon them, and all the others will be paid in full. It was hardly disputed that if the declaration in the order "that notwithstanding the rule numbered 32 of the certified rules of the society, the borrowing of moneys by the society, or by the trustees or directors or officers thereof on behalf of the society was ultrà vires and invalid, and created no liability as against the society in liquidation or the members or assets thereof," was a correct statement of the law, the orders of the Court of Appeal were right, so far as they decided that the persons represented by the appellants could not avail themselves of their specified securities, or claim to come in before the shareholders. But it was denied that this was a correct statement of the law; and it was contended that the persons representing this £50,000 should at least come in pari passu with those represented by *Hawkins' Case.* In that case the loss will in the first instance fall upon the shareholders. If, as is possible, though I hope it may prove otherwise, the loss exceeds the amount claimed by the shareholders, it will be of practical consequence whether the specific securities can be made available for the benefit of those lenders who hold them, so as to throw the loss first on the shareholders and then on the unsecured lenders.

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(1) *Ante*, p. 525.

If the declaration is a correct statement of the law, it was argued that nevertheless the order was erroneous in so far as it postpones the persons represented by the appellants to the investing shareholders. It was argued that they ought to come in pari passu with them. If your Lordships take the same view which I do, it is not necessary to consider this.

I propose first to consider the question whether this declaration is or is not a correct statement of the law, that being I think the most important question in the case, at least as regards the interest of the parties.

The Vice-Chancellor of the county palatine in his judgment of the 12th of May, 1882, says: "The 32nd of those rules confers upon the trustees or directors thereof a power to borrow money without any limit or restriction as to amount, but in my judgment this power, being without a limit is bad, and indeed this was almost admitted in the argument, and the point is covered by Lord Hatherley's judgment in *Laing* v. *Reid* (1) and other cases." He does not by name cite any other case than *Laing* v. *Reid* (1), but evidently thought there were others.

In the Court of Appeal the late Master of the Rolls, in *Calvert's Case*, says (2), "This is a building society with a rule which empowered the governing body of the society to borrow unlimited sums of money. This rule has been certified and been acted upon to a very considerable extent. But it is now well settled by the law that in such a society as this an unlimited power to borrow is not authorized, and that consequently such borrowing is beyond the powers of the society. Still all has been done here perfectly bonâ fide. The persons who made the rule, as well as those who acted upon it by borrowing and lending, all acted under a common mistake in law that that was a lawful rule, and was binding on the society." He then proceeds to state that on the winding-up it appeared that a large part of what formed the assets of the society was derived from money, "obtained in some shape or other from people who lent their money either without security or on equitable deposits or mortgages of property to the society, and the present respondent is one of those persons. Such borrowing from her was unauthorized, and consequently her loan to the society did not create either a legal or an equitable debt from the society to her." Cotton L.J. and Bowen L.J. concurred.

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(1) Law Rep. 5 Ch. 4.

(2) 23 Ch. D. 450.

It appears from the report that the counsel who argued for the then respondent before the Court of Appeal, as well as those before the Vice-Chancellor, did not at least strenuously deny that the rule was ultrà vires, apparently relying more upon other grounds. But the very learned judges were not passive instruments in the hands of the counsel, and even if it had been admitted, certainly would not have given this judgment unless they had believed that it was settled that though according to *Laing* v. *Reid* (1), the authority of which was not impeached, and which indeed was binding on the Court of Appeal though not on this House, a rule similar to that in question if it contained a limit as to the amount to be borrowed was good, yet that a rule not containing such a limit as to amount was ultrà vires. Counsel not having urged the point may account for the late Master of the Rolls not entering into the reasons further than saying it "was well settled," but that does not deprive the now respondent of the benefit of the fact that the Judges in the Court of Appeal, two of whom, the late Master of the Rolls, Sir George Jessel, and Cotton L.J., had as much experience in this branch of the law as any one, and certainly much more than I can pretend to, thought it well settled. I for a time thought it probable that there were some decisions, not known to me, which supported their opinion. The research of counsel has produced all the authorities known to them, and my own research, and the inquiry which I have made of the surviving members of the Court of Appeal, lead me to the conclusion that the whole of the authorities, certainly all the reported cases, have been brought before the House.

I will first before going to the cases consider the statute 6 & 7 Wm. 4 c. 32. It begins with a preamble: "Whereas certain societies commonly called building societies have been established in different parts of the kingdom principally amongst the industrious classes, for the purpose of raising by small periodical subscriptions a fund to assist the members thereof in obtaining a small freehold or leasehold property, and it is expedient to afford encouragement and protection to such societies and the property obtained therewith." And I think it material to see what authority, if any, to borrow would be given to the managers of such a society at common law, and then to consider the language of the Act. The 6 Geo. 1 c. 18 s. 18, commonly called the Bubble Act, had been repealed by 6 Geo. 4 c. 91, and from that time I know of nothing to render it illegal for any number of persons to agree together that each would take a share of a specified amount on which he should bind himself to the others, or to a trustee for the others, to make small periodical payments till the whole was paid up, and to do this for any legal purpose such as the purpose of raising a fund to be applied for the object recited in this preamble; each member as between himself and the other members being liable only to the extent of his share, and as between themselves only liable to pay at the time and in the manner stipulated.

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(1) Law Rep. 5 Ch. 4.

In Lindley on Partnership 1st Ed. p. 152, after examining the authorities, the author arrives at the conclusion in which I agree, that the legality at common law of societies not otherwise objectionable than because the members held shares, may be considered as finally established. There might probably be practical difficulty in carrying on such a society with safety or perhaps at all without the aid of a statute.

In order to apply the fund for the purpose indicated in the preamble to 6 & 7 Wm. 4 c. 32, the shareholders must employ somebody (whether directors or paid agents not members) to transact the necessary business. And as some expense must be incurred for these purposes in conformity with the maxim, "quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud," the members who gave the agents authority to incur that expense were liable as their principals, and unless either some statute or the bargain made with the persons to whom the liability was incurred confined their recourse to the funds of the society, inclusive of the amounts which the society could enforce against the shareholders, those members would be liable personally to the full extent of all their means. The amount of such liabilities to outside creditors would, however, generally be small. In the present case whilst the whole of the liabilities of the society exceeds £80,000 the liability to the outside creditors is little more than £200. But it is not necessary for the purpose of managing such a fund to borrow money, and the managers therefore would not merely as such have authority to borrow. The members might if they pleased authorize them to do so, so as to charge not only the funds of the society, but also their individual responsibility. It would be very injudicious to do so, but they might do it. I do not think that even before *Cox* v. *Hickman* (1) it could have been held that they became partners, and so necessarily gave the authority. They might also (I am still speaking of matters as they were before the statute was passed) authorize the managers to borrow money from those who were willing to lend it, on the terms that the lenders should have a charge on the funds of the society and on the unpaid subscriptions of the shareholders, but should have no recourse against the members further than the society or its trustees had recourse against them, yet give them no authority to borrow on any other terms. And I see nothing to prevent such a bargain being good, though I do see that practically there would be great risk, in the absence of a statute, of not being able to establish that the loans were made on those terms.

Now, after reciting this preamble the legislature proceed to enable any number of persons to form such societies (which I think they could do at common law), and to make rules, "so as such rules shall not be repugnant to the express provisions of this Act and to the general laws of the realm." And they provide that such rules should be certified and registered, so that all who dealt with the society might see what the rules actually were, and I think that those who dealt with the society could not say that any authority beyond what would be implied from the management of the fund was given, unless it was given by the rules, which they ought to have examined. This removed one great practical difficulty in the way of working such societies.

There is no provision in the statute, that I can find, that prevents the members of such a society from being personally liable to any one who had a debt exigible from the society, but if the debt was contracted under a rule which required that the debt should only be contracted on the terms that the funds of the society should be liable and not the persons of the members, the liability would be so limited. Whether any particular rule did so limit the responsibility or not was a question which must have depended upon the construction of the rule.

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(1) 8 H. L. Cas. 268.

The 6 & 7 Wm. 4 c. 32 was not artificially drawn. It is obvious that those who promoted it were influenced mainly by a wish to help the industrious classes to obtain dwelling-houses or small plots of land, and probably supposed that by limiting the maximum of a share to £150 they had secured that the shareholders should use the society only for the purpose of obtaining mortgages not above the value of £150. It was very soon found out that there was nothing to prevent a person who wished, as a speculative builder, to borrow £15,000 from taking 100 shares if he could find a society willing to lend so much on mortgage. And societies were formed and registered under the Act as building societies on a very large scale. In some of those rules were framed more or less resembling rule 32 in the present case, under which the managers acted as those of this society have done. In others, without any rule to authorize or purporting to authorize it, the managers of the society acted in the same way.

After a protracted parliamentary inquiry the Act of 1874 was passed, repealing the Act of 6 & 7 Wm. 4 c. 32, but by sect. 8, amended by the Act of 1875, this does not affect the existing societies unless they registered under the new Act, which the present society had not done.

In 1857 Sir Richard Bethell, afterwards Lord Westbury, when Attorney-General, gave an opinion for the guidance of the certifying barrister, which I take from the Report in the parliamentary papers 1869, No. 399, p. 121. It was as follows:—"I am of opinion that a rule authorizing the raising of money for the purpose of the society would be repugnant to the fundamental principles of the society, and that it cannot be certified as a rule in conformity with law and with the provisions of the statute."

This opinion was questioned, and in 1869 a bill was filed by Thomas Heron Laing, a member of the Northern Counties Permanent Building Society on behalf of himself and all other shareholders of the society (except the defendants) against the trustees of that society for an injunction to restrain them from acting on the 18th rule of that society, which had been it was admitted on the bill duly certified by Mr. Tidd Pratt as long ago as 1851. The rule is set out at length in the report of *Laing* v. *Reid* (1), thus:—"XVIII. (1.) That the trustees for the time being may from time to time, as occasion shall require, borrow and take up at interest any sum of money from any banker with whom the funds of this society shall be deposited, or from any other person; to procure which the trustees may give their own personal security, and they shall be indemnified out of the first funds of this society which shall be received. (2.) That the parties lending money to the trustees of this society pursuant to the provisions herein contained shall be allowed interest for the same at the rate of and not exceeding 5 per cent. per annum, such interest to be payable half-yearly or otherwise as may be agreed upon, and that all loans shall be repayable to the lender by giving twenty-eight days' notice on any monthly meeting night of the society. (3.) That for securing the repayment to the person or persons advancing the same of all moneys to be so borrowed by the trustees on behalf of the society as aforesaid, it shall be lawful for them, the said trustees, to give or authorize to be given such form of security as may be legal and as the trustees shall think proper and necessary for and in respect of the same. (4.) That no trustee (unless by his consent expressly signified in writing on the security to be given to any lender) shall become responsible for any sum or sums of money so borrowed as aforesaid. (5.) That the total sum of money to be borrowed under this rule shall not at any one time exceed two-thirds of the amount for the time being secured by the mortgages to the society, including the mortgage or mortgages for which such advance or advances may be required." In the report in the Law Reports, 5 Ch. p. 4, the rule is very much abridged, and I think the abridgment has misled many persons (including Vice-Chancellor Malins in a case I shall presently refer to) as to what the legal effect of the rule was, and consequently as to what was the actual decision of the Court of Appeal in *Laing* v. *Reid* (2); and perhaps, though I say this with less certainty, as to what Lord Hatherley meant in a part of what he is reported as saying.

(1) 39 L. J. Ch. 2.

(2) Law Rep. 5 Ch. 4.

The rule seems to me to limit the recourse of the lenders to the funds of the society and the securities actually given under sub-section 3, and to exclude the personal liability of any member except of those who had given as trustees their personal security. I should have said this even if the sub-section 1 stood alone, but when the 4th sub-section is read with it I think it is quite clear. The 5th sub-section adds a limitation, not as to who should be liable but as to the amount to be borrowed.

The rule now in question, 32, as I construe it does not contain any power to borrow on the security of the members, that given being only to make the moneys borrowed a first charge on the society's funds and property, and therefore so far is I think identical with that of *Laing* v. *Reid* (1). But there is no limitation on the amount to be borrowed, and in that respect the rule now in question differs from that which in *Laing* v. *Reid* (1) was held valid.

The bill was demurred to avowedly for the purpose of raising the question whether the rule was, as Sir Richard Bethell had advised, repugnant and void or not. Vice-Chancellor Malins refused to decide this question on demurrer. There was an appeal before the then Lord Chancellor Lord Hatherley and Giffard L.J.

The judgments were verbal; conciseness was not among the many merits of Lord Hatherley. The report in the Law Journal was probably abridged, that in the Law Reports, 5 Ch. 4, is evidently much more abridged. After stating that he thought that the demurrer was a proper mode of raising the question of law, he proceeds (I quote from the report in the Law Journal) to say: "If the law prohibits the raising of such sums of money, no certificate of the barrister could make it any better. But does the Act of Parliament in effect prevent or forbid any such arrangement being made as has here been made? If the rule had been a rule by which the society were authorized through the medium of its trustees to raise an unlimited sum of money, wholly regardless of the contributions made by the members, the effect would be plainly contrary to the spirit of the Act." He then describes the Act and what appeared to have been done, and is then reported to proceed: "In substance it comes to this:

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(1) Law Rep. 5 Ch. 4.

so far from being contrary to anything in the Act it is simply a regulation by which they say, we are desirous of making available for the objects of the Act (that is admitted by the bill), for the purpose of purchasing freehold lands, our contributions and fines and other payments in the best possible manner for us all; and to say that it will injure one or other, when the company is framing its rules, is nothing to the purpose; they are the best judges of that. The whole body form the rules, each judges for himself, and they carry the rules by a majority, and submit them to the barrister." I think these expressions, which are not fully stated in the abbreviated report in the Law Reports, 5 Ch. 4, throw some light on what Lord Hatherley was thinking of when he spoke of raising an unlimited sum of money "wholly regardless of the contributions made by the members." Giffard L.J.'s judgment is much the same in both reports. Sir Richard Bethell's opinion had been cited in the argument, and Giffard L.J. evidently had its terms in his mind when he explains what he thinks would be "repugnancy" to the Act, viz., a rule making the society a society different from that specified in the Act. I do not find a word in his judgment to indicate that he relied on the limit of the amount contained in the 5th sub-section. The decision, which has never been reversed or even questioned, was that that particular rule, which, as I construe it, confined the recourse of the lenders to the personal security of such trustees as by express writing made themselves responsible, who were to be indemnified out of the first funds of the society, and to the securities which might be given to the lenders, and which also limited the amount to be borrowed, was valid. This decision was on the 4th of November 1869. On the 17th of December 1869, Giffard L.J. pronounced judgment in *In re National Permanent Building Society, Ex parte Williamson* (1), and there he says: "The matter itself is a very simple one. This company is what is called a benefit building society. Until the recent case of *Laing* v. *Reid* (2) it was doubted whether, even if you put a limited borrowing power among the rules of a society of this sort, that particular rule would be legal. But what we have here is a limited benefit building society, without any power to borrow, and the rules and very

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(1) Law Rep. 5 Ch. 312.

(2) Law Rep. 5 Ch. 4.

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nature of that society shew that it would be contrary to its constitution to borrow money so as to bind the company or to make the individual members of the company, as members, liable for borrowing money; because the whole constitution of the society is that the members are to make certain monthly payments, and in consideration of these monthly payments and the fines provided by the rules they are to receive certain loans."

What is here decided is that a society under this Act has no power to borrow unless its rules authorize it so to do, and that is, I think, as well as settled to be law as anything not yet decided by this House can be.

I do not think that the actual decision in *Laing* v. *Reid* (1) ought to be put higher than that a rule which authorized borrowing, but was so expressed as on its construction not to make the members as such liable for the money borrowed, and which also had a limit as to the sums to be borrowed, was valid. It left it open to any one to say that had not both these limits existed, non constat that the decision would not have been different. And I think also that the language of Lord Hatherley is such that it might fairly be argued that Lord Hatherley attached weight to the limit as to amount contained in the 5th sub-section of the rule. I do not think that could be said of Giffard L.J. And the legislature in the Act of 1874, by the 14th section, expressly limited the liability of members, as such, in societies under that Act, in all cases. And in the 15th section, whilst by the 1st sub-section authorizing borrowing, and thereby shewing that the legislature did not think it expedient to adopt Sir Richard Bethell's opinion that all borrowing was repugnant to the fundamental principle of such a society, did also by the 2nd sub-section shew that they thought it expedient at least to put a limit on the amount to be borrowed. But though such limit as to the amount which the trustees are authorized to borrow is obviously highly expedient, I do not see how such a limitation on the amount can, on any principle, be said to affect the question whether the borrowing is repugnant to the principles of the society. As Mr. Davey forcibly put it in his argument, whether there should be a limit on the amount is a question not of principle but of expediency. If all borrowing power is repugnant to the fundamental principle of the society, it cannot be that a power to borrow a sum limited in amount is not repugnant. But though this is my opinion, it certainly was not that of Vice-Chancellor Malins.

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(1) Law Rep. 5 Ch. 4.

In March 1870 *In re Victoria Permanent Building Investment and Freehold Land Society, Hill's Case* (1), came before Vice-Chancellor Malins. There had been a set of rules certified by the barrister, amongst which had been a rule empowering the directors to borrow money, but on the revision of those rules in 1861 that rule was, in consequence of the opinion of Sir Richard Bethell, struck out. The rules subsequent to 1861 contained no power to borrow. The revision of the rules had been apparently conducted in a somewhat slovenly manner, and the 19th rule, as certified in 1861, contained language that alluded to the rule previously struck out. The Vice-Chancellor, at p. 619, said it did not give any power to borrow at all. That being so, all that it was necessary to decide was that there was no power to borrow, so that members were not liable, as individuals, to pay calls made in the winding-up for the purpose of paying the lenders. And that was apparently all that the Vice-Chancellor did decide.

But though it was quite unnecessary, in a case where there was no such rule, to say anything about the validity or invalidity of a rule giving a borrowing power, the Vice-Chancellor did give a judgment on that question, expressing his dissent from *Laing* v. *Reid* (2), which, even if wrong, was binding on him, and to my mind his reasoning is unsatisfactory. Yet it is upon this altogether unnecessary opinion, and, as far as I can discover, upon this alone, that the late Master of the Rolls must have acted when he said that it was well settled. The Vice-Chancellor Malins assumes, without giving any reasons for it, that a rule giving a power to borrow, if valid at all, must give a power so as to enable those who borrowed to pledge the credit of the members as individuals. Whether a rule which authorized the managers to pledge the members as individuals was ever certified or not I do not know; it certainly would be eminently inexpedient that there should be such a power. Whether, if such a rule existed it would be valid is a question which has never, as far as I can find, been raised; it certainly was not raised in *Laing* v. *Reid* (2). I think there is ground for saying that Lord Hatherley meant to say that a power to raise money on the security of the individual members, irrespective of the amount of their contributions, would, in his opinion, be repugnant to the objects of the Act. I am by no means prepared to decide that question either way until it arises, which it never has hitherto, and certainly does not in the present case. But a rule giving power to borrow from those who were willing to accept as their only security the funds of the society, including the contributions which members might as such pay to the society, and the personal liability of such persons as chose to pledge their personal liability, stands on a very different footing. The Vice-Chancellor does not seem to have perceived that there might be such a distinction, and certainly not to have perceived that such a distinction did exist in the rule in *Laing* v. *Reid* (1).

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(1) Law Rep. 9 Eq. 605.

(2) Law Rep. 5 Ch. 4.

The only other case of those brought before your Lordships' notice which I think it necessary to refer to is *In re Professional, Commercial, and Industrial Benefit Building Society* (2), in 1871. The language of James L.J. has been cited as shewing that he was under the impression that *Laing* v. *Reid* (1) was to be understood in the limited sense put upon it by Malins V.C. in *Hill's Case.* And though it is clear that no such point needed to be decided by James L.J. I think that any opinion which he expresses on such a point is worthy of great attention. There had been an additional rule made in March 1870, which, on inquiry at the registrar's office, it appears was duly certified, though the expressions attributed to James L.J. had made that seem doubtful. That rule was in terms not substantially differing from the 1st sub-section of rule 18 in *Laing* v. *Reid* (1). It did not contain anything equivalent to the 5th sub-section. The question to be decided was whether the society should be wound up on the petition of persons who, if it was wound up, would, or at least might be, contributories, but who certainly were not creditors.

James L.J. is reported to have said: "Then the petitioners say, we have a strict right to an order; we are contributories." The Lord Justice points out that no statutable proof of inability to pay its debts was given against the society, and proceeds: "Nor has the insolvency been proved otherwise to the satisfaction of the Court. It has not been proved to my satisfaction that there is any debt whatever in respect of which the society could be liable. First of all, a society of this kind is not entitled to borrow money except under a particular rule. It is no part of its business to borrow money. It may incur debts, no doubt, to a certain extent; it must, for instance, incur office rent and employ a solicitor and a secretary, and to that extent, probably, there is always some small amount of debt which every body of this kind must incur. But, beyond this, it is very difficult to see what debts it could legally incur." So far, what he says is in exact conformity with what I have endeavoured to state as my view of the law. But he goes on: "But it appears that the society, having gone on receiving deposits from persons other than members, and having incurred a debt to its bankers, passed a resolution authorizing the trustees to borrow money for the purposes of the society. I am of opinion that in accordance with the decided cases" (speaking as he was on the 1st of August 1871, the decided cases can only have been *Laing* v. *Reid* (1), *Ex parte Williamson* (2), and *Hill's Case* (3)), "that resolution was expressed in terms far too wide to make it a valid or binding resolution, and therefore there never was any debt which the society, quâ society, could be sued upon." He proceeds to point out that, to some extent at least, they might come on the funds of the society.

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(1) Law Rep. 5 Ch. 4.

(2) Law Rep. 6 Ch. 857.

Mellish L.J. is far more cautious. He says: "Then, as respects their liability" (that is, their individual liability as contributors to make good the loans), "I agree with the Lord Justice that, in all probability, they were never liable to anything: but, even if they were liable all the alleged creditors of the society have joined in a release, and I have no doubt that that release is an effectual protection." Now, though James L.J. had not any need to decide this, and may not have put his mind to the point, he does, I think, intimate that his impression was that the rule, not limiting the amount of money to be borrowed, was, according to *Laing* v. *Reid* (1), not valid. I have already expressed my reasons for coming to a different conclusion, but I think Lord Justice James' expressions are an authority against me. But I do not think it can, in any possible view of it, be held to settle the law.

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(1) Law Rep. 5 Ch. 4.
(2) Law Rep. 5 Ch. 309.
(3) Law Rep. 9 Eq. 605.

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If the rest of the noble and learned Lords agree with me in thinking that a rule authorizing borrowing, so as to charge the funds of the society, but not the persons of the members, is valid, though there is no limit, such as that in the 5th sub-section of the rule in *Laing* v. *Reid* (1), it is necessary to decide whether the specific securities pledged to the lenders can be made available. That, I think, is a question depending on the construction of the rule.

If there had been an express clause enabling them to mortgage specifically property of the society (and perhaps one similar to the 3rd sub-section in the rule in *Laing* v. *Reid* (1) might be so construed) I think that the reasoning I have submitted to the House leads to the conclusion that the specific pledges would be good. And the same would perhaps follow if such a power to pledge specific property was implied. But there is certainly no express power to pledge given, and I think that the terms of the rule, which make all the loans a first charge on the funds, which would lead the lenders to believe that in the event of a winding-up, at least, they would all come in pari passu, are quite sufficient to negative an implied power to mortgage, even if such a power could be implied from a power to borrow. I do not, however, think there is any ground for such an implication, even if this did not negative it.

The case of *Murray* v. *Scott* I think, was rightly decided by the Court of Appeal. I am relieved from any necessity for saying more about it than that I quite agree in the reasons given by the late Master of the Rolls.

The result is that I agree in the proposed judgment.

LORD WATSON:—

My Lords, the questions brought before the House in these appeals have been so fully and exhaustively treated by my noble and learned friends that I shall content myself with indicating some of the considerations which have induced me to concur in the judgment which has been moved.

One of the most important of these questions relates to the validity of rule 32, which gives the directors power, from time to time as occasion may require, to borrow money from the society's banker or from any other banker or person. In both the Courts below it was assumed to be settled law that the rule was invalid, because it does not impose any limit upon the amount which the directors are authorized to borrow. It cannot with strict accuracy be said that the power conferred is absolutely without limit, seeing that it is only to be exercised "as occasion may require," which plainly implies that it is not to be exercised at all except in the case of a loan being needed for the purposes of the society in the course of its legitimate transactions as a benefit building society. It is obvious however that the kind of limit which was assumed to be necessary in order to validate the rule, was that indicated by Lord Hatherley in *Laing* v. *Reid* (1), viz. a pecuniary limit proportionate to the trading capital of the society derived from the contributions of its members. I agree with your Lordships that there is nothing in the provisions of 6 & 7 Wm. 4 c. 32 which either expressly prohibits or can by reasonable implication be held to disable the members of a benefit building society, whose constitution and powers are still regulated by that Act, from authorizing their directors to borrow money, although in the absence of such authority the directors would not have that power. Upon that point *Laing* v. *Reid* (1), and the cases which followed it, to which I need not specifically refer, are all direct precedents, and so far I do not doubt that they were well decided. But it was contended at your Lordships' Bar, and the Vice-Chancellor of the county palatine, as well as the learned judges of the Court of Appeal, seem to have thought, that these cases form a series of decisions to the effect that any authority to borrow given by the members to their directors is wholly void unless it be qualified by a limitation of the amount to be borrowed such as I have described.

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(1) Law Rep. 5 Ch. 4.

An examination of these cases, all of which have been already noticed by my noble and learned friend Lord Blackburn, satisfies me that in none of them was the present question as to the validity or invalidity of that which has been termed an unlimited power to borrow raised and decided. The doctrine that such a power is ultra vires of the society, and therefore void, had its origin in the opinion expressed by Lord Hatherley in *Laing* v.

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(1) Law Rep. 5 Ch. 4.

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Reid (1), an opinion which was referred to as authoritative in subsequent cases although the point did not there arise for judicial determination. In *Laing* v. *Reid* (1) the sum authorized to be borrowed was restricted to two-thirds of the total amount for the time being secured to the society by mortgage, so that there was no question before the Court as to the legality of an unlimited power. But it certainly appears to me that Lord Hatherley in that case sustained the power on the express ground that it was limited as to amount, and that the limit was proportioned to that part of its contributed capital which the society had advanced to its members or lent on mortgage; and I think the noble and learned Lord did intend to lay down the law to the effect, that without some limitation of that character the power would have been invalid. I prefer the test of its legality applied by Giffard L.J. to the rule which he had to consider along with Lord Hatherley in *Laing* v. *Reid* (1):—"does this rule merely provide a method of conducting business? or is it a rule making the society a thing different from a benefit building society?" The legality of such a rule appears to me to depend upon the natural and probable results of the due exercise of the power which it confers, and not upon the consequences of its possible abuse by unscrupulous or fraudulent directors. It is quite conceivable that a benefit building society might find legitimate uses for borrowed money to an amount exceeding two-thirds of its contributed capital; and it is also conceivable that a power to take on loan not more than two-thirds might be abused, and the money borrowed embarked in transactions foreign to the legitimate business of the society. No power, the exercise of which will necessarily or naturally involve a violation of the statutory constitution of the society, can be sustained as valid by a Court of law: but on the other hand it appears to me to be beyond the functions of the Court, to lay down a hard and fast rule, dictated by considerations of expediency, which may give some societies more latitude than they require, and may restrict the legitimate business of others. I am accordingly of opinion that rule 32 is unexceptionable. As I read the rule, it merely empowers the directors to raise money by way of loan when that becomes necessary for the purpose of carrying on the proper business of the society; and it does not appear to me to admit of serious dispute that the sums actually borrowed by the directors, though of large amount, were exclusively employed by them for that purpose.

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(1) Law Rep. 5 Ch. 4.

There is another question, attended with much nicety, and of great importance to some of the litigants, which relates to the right of those creditors who lent money to the society upon the faith of specific securities. What would have been the precise rights of those creditors if rule 32 had not contained the declaration that "any borrowed money shall be a first charge on the funds and property of the society," and if there had been added to the rule the further declaration that it should be lawful for the directors to give to lenders such form of security as might be legal, and as the directors might deem proper, are questions which I do not think it necessary for the purposes of the present case to determine. The rules of this society do not give, at any rate do not expressly give, authority to the directors to borrow on mortgage; and the declaration in rule 32 appears to me to be so expressed as to qualify the power of the directors, and to fix the security which is to be given alike to all lenders to the society. As the rule stands, it conveys an intimation to lenders that all loans are to constitute a first charge upon the assets of the society, and it would, in my opinion, be inconsistent with any reasonable construction of the rule to hold that the directors were thereby authorized, in the first place to borrow largely on the faith of that intimation, and then to make over the whole property and funds available for payment of these loans in pledge to preferable creditors. I have therefore come to the conclusion that lenders holding specific securities must nevertheless come in pari passu with unsecured creditors who have advanced money to the society in reliance upon rule 32.

Order appealed from in Murray v. *Scott and others affirmed.*

Orders appealed from in Brimelow v. *Murray and Agnew and another* v. *Murray reversed, except so far as they direct the delivery up of deeds and documents to the official liquidator. For the rest of those orders a declaration substituted "That, subject to and after payment in full of*

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the costs of the winding-up of the society, including the costs of all the appeals to this House, and of the debts of the creditors of the society other than persons having advanced moneys to the society, and for which debts provision has been made with consent of all parties, the assets of the society should be applied in payment of all persons having advanced money on loan to the said society, or the trustees or directors thereof, whose claims remain unsatisfied; in full, if the assets are sufficient, or if not, of a dividend pari passu and pro ratâ; and that the surplus, if any, should be applied in payment of the amounts due to those members of the society who are represented by the claimants Scott and Whittle, in priority to the members who are not holders of deposit or paid-up shares; and the residue, if any, to the other shareholders; but as to all the members aforesaid, subject and without prejudice to claims to priority inter se upon the ground of notices of withdrawal given to the society before the commencement of the winding-up" (1); *the official liquidator out of the assets to pay to Brimelow and Agnew and Birch their costs in the Courts below, and the costs of the appeals to this House; causes remitted to the Court below.*

Lords' Journals 23rd May 1884.

Solicitors for Murray: *Pritchard, Englefield & Co., for Boote & Edgar, Manchester.*

Solicitors for the Respondents in *Murray* v. *Scott*: *Marsland Hewitt, & Everett, for Addleshaw & Warburton, Manchester.*

Solicitors for the Appellants in *Agnew* v. *Murray*, and *Brimelow* v. *Murray*: *Phelps Sidgwick & Biddle, for Sale, Seddon, Hilton & Lord, Manchester.*

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(1) This declaration (slightly varied from the terms of the motion put to the House) was drawn up by consent of the parties.

[PRIVY COUNCIL.]

JONMENJOY COONDOO . . . . DEFENDANT;

AND

GEORGE ALDER WATSON . . . . . . PLAINTIFF.

J. C.*
1884
Feb. 6, 7;
March 1.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Power of Attorney—Power to sell or purchase does not include Power to pledge—Principal and Agent.

A power of attorney gave to the holders authority "for the purposes aforesaid to sign for me and in my name and on my behalf any and every contract or agreement, acceptance, or other document," the purposes aforesaid being "from time to time to negotiate, make sale, dispose of, assign, and transfer" Government promissory notes, and "to contract for, purchase, and accept the transfer" of the same:—

Held, that upon the true construction of this power the holders were authorized to sell or purchase such notes, but not to pledge them.

Bank of Bengal v. *Macleod* (1) distinguished.

APPEAL from a decree of the High Court (May 4, 1882), reversing a decree of Wilson, J. (Dec. 22, 1881) which was in favour of the appellant.

On the 25th of April, 1881, the respondent sued to recover possession from the appellant of a promissory note of the Government of India of the £4 per Cent. Transfer Loan 1879 for Rs.20,000, with interest and damages for the detention of the same, on the ground that the said note belonged to him and had been illegally and improperly indorsed and delivered by his attorney and agent to the appellant as security for a loan to his said attorney, and that at the time the appellant received the same he knew, or by proper diligence might have known, that the note had been pledged for the purposes of the attorney, and that he had no power or authority to pledge the same.

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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(1) 5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35.

The appellant answered that the Government promissory note in question was duly and properly indorsed and transferred to him by the attorney and agent of the plaintiff, acting within the terms and scope of his power of attorney and authority, to secure an advance of Rs.19,000 made by the appellant to the attorney, and that so far as the appellant was concerned, the transaction was perfectly bonâ fide and in the ordinary and usual course of business.

The facts of the case and the power of attorney appear in the judgment of their Lordships.

Rigby, Q.C., and *Rolland*, for the appellant, contended that the power of attorney in its true construction was wide enough to cover the transaction, that is to authorize the indorsement and transfer in question. If the appellant had bought the Government paper and paid the money for it, there is no doubt that a good title to it would have passed. But it is contended that because the words are not so wide as they might have been, and because he contracted to be bailee, and not purchaser, therefore he took no title at all. Reference was made to *Bank of Bengal* v. *Macleod* (1), *Bank of Bengal* v. *Fagan* (2). The principle is that the words in this power cover a pledge and do not necessarily point to a sale out and out. The old doctrine before it was interfered with by the Factors Acts, was that an agent to sell could not pledge. Reference was made to *De Bouchout* v. *Goldsmid* (3), *Wilson* v. *Moore* (4). The case for the appellant is that "negotiate" includes "indorse," and that *Bank of Bengal* v. *Macleod* (1) is decisive. *Ireland* v. *Livingston* (5) decides that if a principal instructs an agent in such a way that the agent fairly and honestly understands authority to be given, he may exercise such authority and the principal is bound. There is nothing here which expressly confines the agent's authority to a ready money purchaser, the reasonable construction is that a power to borrow was included.

(1) 5 Moore, Ind. Ap. 1.
(2) 5 Moore, Ind. Ap. 27.
(3) 5 Ves. 211.
(4) 1 M. & K. 337.
(5) Law Rep. 5 H. L. 395.

The word "sign" is also to be considered. It means that the agent has very wide powers. A power generally to sign any contract or agreement confers a position of trust and confidence, it gives power to decide, and therefore the principal should suffer. There is no limit to the extent to which the agent might pledge the principal's credit on such words as these. He could purchase shares to any amount; and could give a promissory note in the name of his principal. "Negotiate" includes negotiate by way of pledge. So does "dispose of." [LORD BLACKBURN:—But is there an authority for the agent to borrow for himself, to pledge on his own account? SIR BARNES PEACOCK:—Is government paper a negotiable instrument under the statute of Anne? Could the Government or an indorser be sued upon it?] It is like an Exchequer bill in this country under 57 Geo. 3, c. 34. Reference was made to *Wokey* v. *Pole* (1).

Cohen, Q.C., and *Woodroffe*, for the respondent, contended that the agent had no authority to borrow in the respondent's name, or to pledge the Government paper in question. The purpose for which the power of attorney was given should be attended to, and the meaning of the expressions used should be subordinated thereto. Taking the whole power into consideration there is no authority to borrow, the authority is to sell and purchase shares; there is no power to pledge the principal's credit. Reference was made to *Taylor* v. *Kymer* (2), Story on Agency, sect. 68, 69; *Attwood* v. *Mullings* (3). A power to borrow cannot be presumed, for it was not incidental to the duties which the agent undertook; and in this case the money was not in fact borrowed for the purpose of those duties. Even the power to purchase means a power to purchase for cash: Story on Agency, sect. 77. With regard to the negotiability of this paper it is not a promissory note within the meaning of the statute of Anne. The transferee takes no better title than the transferor unless by the law merchant, or unless the instrument is negotiable or comes within *Goodwin* v. *Robarts* (4). The case of *Glyn* v. *Baker* (5)

(1) 4 B. & A. 1.
(2) 3 B. & Ad. 320.
(3) 7 B. & C. 278.
(4) 1 App. Cas. 476.
(5) 13 East, 509.

distinguishes Exchequer bills by what is on the face of them. Reference was made to *Bank of Bengal* v. *East India Company* (1); *P. & O. Company* v. *The Secretary of State for India* (2); *Nobinchunder Day* v. *Secretary of State for India in Council* (3); *Crouch* v. *Credit Foncier of England* (4).

Rigby, Q.C., replied.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Respondent in this appeal, George Alder Watson, is a Surgeon-Major in Her Majesty's Indian Army, and the appellant is a merchant at Calcutta. On or about the 18th of October, 1878, the respondent deposited with Messrs. Nicholls & Co., described in the plaint as a firm carrying on business as bankers and financial agents in Calcutta, promissory notes of the Government of India, amounting to Rs.37,500, for which a receipt was given to him by Nicholls & Co., headed "Safe custody receipt." One of those notes was for Rs.20,000. This note was payable to Watson, his executors, administrators, or assigns, or his or their order, and was subsequently exchanged by Nicholls & Co. for a similar note, apparently that the interest might be received at Calcutta instead of Peshawar, where the interest on the former note was payable; but no question arises upon this.

On the 18th of October, 1878, Watson executed and gave to Nicholls & Co. a power of attorney, in the following terms:—

"Know all men by these presents, that I, George Alder Watson, Surgeon-Major, 19th Regiment Bengal Lancers, do make, constitute, and appoint William Nicholls and George Augustus Thomson, of Messrs. Nicholls & Co., financial agents, Calcutta, jointly and severally to be my true and lawful attorneys and attorney, for me and in my name, and on my behalf, from time to time to negotiate, make sale, dispose of, assign and transfer, or cause to be procured and assigned and transferred, at their or his discretion, all or any of the Government promissory notes, or other Government paper, bank shares, or shares in any public company, and other stocks, funds, and securities of any description whatsoever, now or hereafter standing in my name, or belonging to me, or any part or parts thereof respectively. And also for me, and in my name, and on my behalf, from time to time, at their or his discretion, to contract for, purchase, and accept the transfer into my name of any Government promissory notes or other Government paper, bank shares, or shares in any public company, and other stocks, funds, and securities of any description whatsoever, now or hereafter standing in the name or names of, or belonging to, any other person or persons. And also to receive all interest and dividends due, or to accrue due, on all or any of such stocks, funds, and securities. And for the purposes aforesaid, or any of them, to sign for me and in my name, and on my behalf, any and every contract or agreement, acceptance or other document. And to sign, seal, and deliver for me, and as my act and deed, any and every deed which they or he may think expedient."

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(1) Bignell's Rep. 120.
(2) Bourke's Rep. pt. vii. p. 166.
(3) Ind. Law Rep. 1 Calc. 11.
(4) Law Rep. 8 Q. B. 374.

This power of attorney, when produced in evidence, had on the back of it a seal of the Public Debt Office, Bank of Bengal, shewing that it had been registered there, and the new note had on the back two like seals, with the same register number, shewing that a power of attorney had been registered for the receipt of interest and for sale. Watson never gave to Nicholls & Co. any authority to deal with the notes except the power of attorney. The note when produced bore two indorsements, "G. A. Watson, by his attorney, G. Aug. Thompson," "G. A. Watson, by his attorney, G. Aug. Thompson." The former of these indorsements appeared to apply to a receipt for a half year's interest, which was indorsed on the note.

In December, 1880, a broker named Goberdhone, employed by Nicholls & Co., applied to the gomastah of the Appellant for a loan to Watson of Rs.19,000 on the pledge of a Government security for Rs.20,000, and subsequently brought the note for Rs.20,000. Being asked by the gomastah under what authority the name of Watson was signed by Thompson, he said there were two seals on the paper, and from the two seals it appeared that Mr. Thompson had authority to draw interest and sell the paper, so he had full authority. The gomastah then sent the money by one Koylash Chunder Roy to the office of Nicholls & Co., telling him to inquire whether the paper was actually signed by Thompson. What then took place is stated by Koylash Chunder Roy thus:—"In the office the broker took the paper from Ameer Singh's durwan, and gave it to Mr. Thompson. Mr. Thompson gave that paper to me, and said he wanted money on that paper. I asked him if the signature on the paper was his signature, and if he had pledged the paper with Ameer Singh Shumar Mull. He said, 'Yes.' I told him 'The paper stands in the name of Mr. Watson, why do you want money on this paper, and what authority have you to sign for Mr. Watson?' Mr. Thompson said, 'I have got a power of attorney. If you wish to see the power of attorney I can show it to you.' He said he had a power of attorney from *Watson* to manage all his business, and he had authority to receive money on that paper. Then he executed a promissory note, in which he signed for Mr. Watson, gave the promissory note to me with the Government promissory note, and took the money from me." In the account books of the appellant the transaction was entered as a payment of Rs.19,000, on account of pledge of company's paper. Nicholls & Co. having failed, the respondent brought a suit in the High Court of Calcutta, praying that the appellant might be decreed to indorse and deliver up the promissory note for Rs.20,000 to him, and to pay him all such interest as the appellant might have received thereon, and that the appellant might, if necessary, be restrained from parting with it.

The judge before whom the case came on for disposal dismissed the suit, with costs. On appeal to the High Court in its appellate jurisdiction, this decision was reversed, and a decree was made in the respondent's favour, from which there is this appeal to Her Majesty in Council.

It was properly admitted by the learned Counsel for the appellant in the argument before their Lordships that the appellant, having notice that the indorsement was under a power of attorney, was in the same position as if the power of attorney had been perused, and if that power did not authorize the indorsement he must fail. But the Counsel contended that it gave an authority to pledge the Government note, and relied upon the case of the *Bank of Bengal* v. *Macleod* (1). It is necessary to look at the facts, and argument, and judgment in this case somewhat minutely.

The action was one of detinue and debt brought by James William Macleod against the Bank of Bengal. In 1841 the plaintiff sent from England a power of attorney, constituting and appointing Alexander Donald Macleod (his brother), and Christopher Fagan, carrying on business in Calcutta as agents under the firm of Macleod, Fagan, & Co., his attorneys, jointly and separately in their individual names, or the name of the firm, and on his behalf, "to sell, indorse, and assign, or to receive payment of the principal, according to the course of the Treasury, of all or any of the securities of the East India Company for shares in their public loans," to which he was entitled. A. D. Macleod applied to the Bank of Bengal for a loan upon his own account, and offered as a security company's paper, No. 13,397, for Rs.5000. This note bore the following indorsement:—"Pay to G. J. Gordon, Esq., Secretary, Union Bank, or order J. W. Macleod, by his attorney, A. D. Macleod." "Pay to A. D. Macleod, attorney to J. W. Macleod, order, G. J. Gordon, Secretary, Union Bank. J. W. Macleod, by his attorney, A. D. Macleod." The secretary of the bank, upon inspection of the note and the last indorsement, requested to see the power of attorney, which was shewn to him. The bank then took a further indorsement on the note from A. D. Macleod in these words:—"Pay to the Bank of Bengal, or order A. D. Macleod," and the required loan was then made by the bank in the ordinary course of business. Two days afterwards a further loan of Rs.17,100 was made by the bank to A. D. Macleod, upon his depositing two other notes and indorsing them, and his statement that they were his own property.

A verdict was found for the plaintiff, and a rule which was granted to shew cause why that should not be set aside and a nonsuit entered, or why a verdict should not be entered for the defendants, or a new trial granted, having been discharged, the defendants appealed to Her Majesty in Council. The difference between this case and that before their Lordships may be here

(1) 5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35.

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noticed. The power of attorney contained the word "indorse." The loan was made to A. D. Macleod on his own account, and the bank took an indorsement on the note from him on his own account, and not as attorney for J. W. Macleod. In this case, and in the similar case of the *Bank of Bengal* v. *Fagan* (1) (the judgment being given in both cases), it was argued for the Appellants that A. D. Macleod had power to indorse the notes; that "sell, indorse, and assign" might be read either distributively or conjunctively, and the power to indorse was not auxiliary only but was the real object of the power. For the respondent it was argued that the indorsement mentioned in the power of attorney was for the purpose of authorizing A. D. Macleod as agent for the purposes of a sale, and a power to sell did not give a power to pledge, that the word "indorse" was controlled by the context, and the words must be taken collectively. The following passages (p. 38) from the judgment delivered by Lord Brougham shew the ground of the decision:—

"Thus, the main and fundamental question is, had Macleod & Co. authority to indorse under the power of attorney, which is in the same words in both cases. It is to 'sell, indorse, and assign, or to receive payment of the principal according to the course of the Treasury, and to receive the consideration money and give a receipt for the same.' It is contended for the respondent that the words 'sell, indorse, and assign,' used conjunctively cannot be used in the disjunctive, but that the only power given to indorse is one ancillary to sale, and that we are to read it as if it were, power to sell, and for the purpose of selling to indorse. This construction is endeavoured to be supported by referring to the variation of 'or' for 'and' immediately following 'or to receive the money at the Treasury.' We are unable to go along with this view of the instrument. The variation is clearly owing to a new subject-matter being introduced. . . . Shall we then say that a power to 'sell, indorse, and assign,' does not mean a power to sell, a power to indorse, and a power to assign; and would not such a negative or exclusion be doing violence to the plain sense of the words? If we adopt this exclusive construction we must hold that these words not only give no powers to indorse without selling, but also that they give no power to sell without indorsing, and we must suppose an agent acting under such a power to be entirely crippled. . . . It appears to us that the rational and the natural construction is the one which represents a power to 'sell, indorse, and assign,' as a power to sell, a power to indorse, and a power to assign—so that these acts may be done apart or together, and that the powers are conveyed conjointly and severally."

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(1) 5 Moo. Ind. Ap. 40.

It seems to have been thought by two of the learned judges of the High Court that it was laid down in this case, as a rule of construction, that words used in a power of attorney to express the objects of the power are always to be construed disjunctively. Their Lordships cannot agree in this view of the case. The words there may have been used disjunctively, but they do not see any reason why the rule laid down by Lord Bacon, *Copulatio verborum indicat acceptationem in eodem sensu,* which is intended to aid in arriving at the meaning of the parties, should not be used in construing a power of attorney as much as any other instrument.

The power of attorney in the present case is not in the same form as that in the *Bank of Bengal* v. *Macleod* (1). It does not contain in express words a power to "indorse." If it had, the question would have been whether there was anything to prevent it from being a power in the discretion of the donee of it to indorse the note and so convert it into one payable to bearer whenever he thought fit to do so for any purpose. But in this power the indorsement is not authorized in express words, but is authorized if it comes within the meaning of the words, "And for the purposes aforesaid to sign for me, and in my name and on my behalf, any and every contract or agreement, acceptance, or other document." The "purposes aforesaid" are these,—

"From time to time to negotiate, make sale, dispose of, assign, and transfer, or cause to be procured and assigned and transferred [there seems to be a mistake in words here, but it does not make any difference in the meaning], at their or his discretion, all or any of the government promissory notes or other government

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(1) 5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35.

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paper, &c., and also for me, and in my name, and on my behalf, from time to time, at their or his discretion, to contract for, purchase, and accept the transfer into my name of any government promissory notes or other government paper, &c."

The appellant's counsel relied mainly upon the word "negotiate," and also upon "dispose of." In order to see what was intended by these words, they must be looked at in connection with the context, as well as with the general object of the power. This appears to their Lordships to have been to sell or purchase for Watson government promissory notes and other securities, not to borrow or lend money upon them. If the word "negotiate" had stood alone, its meaning might have been doubtful, though, when applied to a bill of exchange or ordinary promissory note, it would probably be generally understood to mean to sell or discount, and not to pledge it. Here it does not stand alone, and, looking at the words with which it is coupled, their Lordships are of opinion that it cannot have the effect which the appellant gives to it, and, for the same reason, "dispose of" cannot have that effect.

It did not appear when the indorsement by Thompson as Watson's attorney was made, but Nicholls & Co. did not deal with the note as having themselves become the holders of it by indorsement, as was the case in the *Bank of Bengal* v. *Macleod* (1). They borrowed the money on behalf of Watson, giving a promissory note for it signed by Thompson as his attorney, and pledged the government promissory note as Watson's. As they had not authority to do this, the authority to sell not giving an authority to pledge, the appellant acquired no title to the note by its delivery to him, and the High Court has properly made a decree in the plaintiff's favour.

Their Lordships will humbly advise Her Majesty to affirm that decree and to dismiss this appeal, and the costs of it will be paid by the appellant.

Solicitors for Appellant: *Watkins & Lattey.*
Solicitors for Respondents: *Vallance & Vallance.*

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(1) 5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35.

[PRIVY COUNCIL.]

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March 7, 8, 11, 12; April 7.

HETTIHEWAGE SIMAN APPU AND OTHERS . . . . DEFENDANTS;

AND

THE QUEEN'S ADVOCATE . . . . . . PLAINTIFF.

(Appeals No. 83,316 and 83,320.)

AND CROSS APPEAL.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Law of Ceylon—Roman-Dutch Law of Holland—Right of the Subject to sue the Crown—Right of Set-off between the Crown and the Subject.

There is no authority for saying that the Roman-Dutch law of Holland, which was in force in Ceylon at the date of its conquest by the British, and has not since been abrogated, empowered the subject to sue the Government.

But since the conquest a very extensive practice of suing the Crown has sprung up and has been recognised by the Legislature: see the 117th section of Ordinance No. 11 of 1868, which re-enacted an Ordinance of 1856:—

Held, therefore, that such suits are now incorporated into the law of the land.

Held, further, that where the Crown is plaintiff and the defendants sue in reconvention, the Court is not bound to give separate judgments, but may set off the amount awarded to the defendants against that awarded to the Crown, and give judgment for the balance.

APPEAL from a judgment of the Supreme Court (June 22, 1881), reversing a judgment of the District Court (Oct. 6, 1880), and decreeing to the respondent his full claim with costs in both Courts.

Appeal and cross-appeal from a judgment of the Supreme Court (June 22, 1881) reversing a judgment of the District Court (June 22, 1880) in part and confirming it in part. On review of the Supreme Court's judgment, it was contended on behalf of the respondent that a subject cannot set up a claim in reconvention against the Crown. The Court held that this point

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[*] *Present* :—LORD BLACKBURN, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

was concluded by their judgment in *Hendrick* v. *The Queen's Advocate* (1), and confirmed their previous decision.

The facts are stated in the judgment of their Lordships.

Marten, Q.C., and *Stock,* for the appellants in the first appeal, contended that the Supreme Court upon the evidence was wrong in reversing the judgment of the lower Court. They referred to Ordinance No. 10 of 1874, sects. 26–28; No. 8 of 1869; Nos. 7 and 22 of 1873; *Erskine* v. *Dean* (2). In the second appeal they contended that the judgment of the Supreme Court on the evidence ought to be reversed so far as it amended or reversed the judgment of the District Court.

The Attorney-General (Sir *H. James*), and *Romer*, Q.C. (*Jeune,* with them), for the Queen's Advocate in both appeals and cross appeal, contended that the judgment was right in the first appeal, and in the second, that so far as regarded the claim on account of the issues of licenses for the sale of foreign liquors it should be affirmed, and that as regarded the claim on account of the refusal to issue a license for the taverns in Kadyanlina it should be reversed. They then contended that a subject in Ceylon cannot set up a claim in reconvention against the Crown: Thompson's Institutes of Laws of Ceylon, vol. i., p. 300. The defendants have no greater right in reconvention than they would have had by separate action. Ceylon was formerly a republic or governed by a republic; when the Crown came in in 1799, the subject lost his rights of this character (if he ever had them) under Roman-Dutch law. And since by the general law of England the right to sue the Crown does not exist the defendants must shew how their right of action arises: *Palmer* v. *Hutchinson* (3).

[LORD BLACKBURN:—Assuming the Roman-Dutch law still to prevail, the defendants must shew that that law gave the right now claimed.]

It is said that a practice to that effect has grown up. But practice cannot interfere with the prerogative of the Crown in

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(1) 4 Sup. Court Rep. 77.

(2) Law Rep. 8 Ch. 726, 765, 766.

(3) 6 App. Cas. 619.

Ceylon any more than in Natal. It must be shewn with certainty that the usual prerogative has been taken away.

Reference was made to *Hendrick* v. *The Queen's Advocate* (1); *Fernandez* v. *The Queen's Advocate* (2); *Fraser's Case* (3).

[LORD BLACKBURN :—The subject may set up any defence against the Crown. What suit he may bring is another matter.]

This is counterclaim, not a mere defence. They claim more than the Crown does. Reference was made to Ordinance 11 of 1868, sect. 117.

There is no trace of this right of suit in Roman-Dutch law. It seems that as a fact the Queen's Advocate is constantly the subject of arrest and execution. As to execution, see Thompson, vol. i., p. 11. This is not a suit within the Ordinance, because you cannot enforce execution. That is the essence of an action or suit.

[LORD BLACKBURN referred to *The Bankers' Case* (4)—a petition of right case.]

The petition of right always goes on that footing, that it affects the conscience.

Then the right of set-off claimed in this case is one which is enforced, from its nature, whether the Crown wills or not, and consequently is not within the argument as to the Crown granting or refusing execution at its pleasure. The right to sue the Crown before Bovill's Act did not give a right of set-off, and the Crown is not mentioned in the statutes relating to set-off. Even if the Dutch law gave a right of set-off that does not avail against the English Crown. See *Fraser's Case* (3) and the proclamation of Sept. 23, 1799, preserving the rights of the inhabitants under Roman-Dutch law. Legislative Acts of Ceylon, p. 6; and Governor North's Letter of 26th February, 1799; the charter of April 18, 1801, clause 19. The respondent's case rests on prerogative, however, and not on statute.

The appellant's contention that the annexation by the English Crown put an end to the Roman-Dutch law is not acceded to;

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(1) 4 Sup. Court Rep. 76.

(2) 4 Sup. Court Rep. 77.

(3) Creasy's Rep. 10.

(4) 14 State Trials, 1.

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the appellants must shew that the Roman-Dutch law is in their favour, and if so, the respondent denies the continuity of the officer. For the existence of the Queen's Advocate, see Despatch of Lord Goderich, and the Charter of Feb. 18, 1833, sect. 46. There are no records in Ceylon of proceedings against the Crown; unless the Queen's Advocate is its representative. The practice of suing him is irregular, and not authorized by law. The Crown carried with it all the prerogatives of the British Crown subject to the liabilities which appertained to the Dutch stadtholder and which it did not abrogate, and unless the appellants make out that their claim is good under Roman-Dutch law, they must fail: *Ruding* v. *Smith* (1). As to prerogative, see Chitty on Prerogatives, p. 32; Chalmer's Opinions, vol. i., pp. 233, 234.

Marten, Q.C., and *Stock*, for the respondents in the cross-appeal, and in reply in the other appeals, contended that according to the law and practice of Ceylon a claim in reconvention for damages, as in these cases, could properly be made against the Crown. If the Queen's Advocate objected in law thereto he should have demurred and not have delayed his objection until his petition in review in June, 1881. It now comes too late. See Latham's Ceylon Cases, p. 14; *Boulston's Case* (2). In Ceylon the District Court was constituted a Court of revenue, and in Exchequer cases the Attorney-General could always be sued. Reference was made to Ordinance No. 11 of 1868, ss. 64, 70, 78, 111, 117. The proceeding was taken in a Court of revenue, and therefore the Crown could be impleaded. Next, the Roman-Dutch law allowed a right of suing the Crown, and the Ordinances subsequent to annexation proceed upon that footing. See Van Leeuwen's Commentaries, ed. 1820, pp. 116, 117, and also p. 661, s. 4; Voet on the Pandects, book xlii., tit. 1, on Res Judicata, sect. 16; Marshall's Judgments of the Supreme Court of Ceylon, pp. 276; 74, 75. Austen's Appeal Reports, 1862 (Colombo), p. 168. Reference was made to *The Bankers' Case* (3); *Attorney-General* v. *Buckeridge* (4); Clark's Colonial Law, p. 544; Charter

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(1) 2 Consist. Rep. 371.
(2) 3 Coke's Rep. 212.
(3) 14 State Trials, 1.
(4) Hardres's Rep. 75, 83.

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of 1833, ss. 28, 33, 47; Daniel's Chancery Practice, 4th ed., vol. i. p. 132; Coke, 4th Inst. The Court of Exchequer, p. 101. *Colebrooke* v. *Attorney-General* (1); *Thomas* v. *The Queen* (2); *Deare* v. *Attorney-General* (3); *Casberd* v. *Ward* (4). The Crown coming into Court to enforce a right must submit to all the rules of pleading. Having allowed all the expense of the litigation on the faith of its submitting to the jurisdiction—it cannot afterwards deny it altogether and say that there is no cause of action at all. The Ordinances must be taken to limit the prerogative.

[LORD BLACKBURN :—Have the Ordinances the force of legislative Acts?]

See Thompson, vol. i. pp. 144, 147. A claim in reconvention as distinct from an original suit is good: Van der Linden's Institutes, p. 417. Demurrer to a cross bill will not hold: Mitford on Pleadings, p. 240; Van Leeuwen, book v., ch. 18, p. 592, on Reconvention; Thompson, vol. i., pp. 301, 300. The Queen's Advocate is constituted by the ancient practice and Ordinances as the representative of the Crown for the purpose of being sued,

The Attorney-General replied.

The judgment of their Lordships was delivered by

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April 7.

SIR ARTHUR HOBHOUSE :—

The facts which gave rise to these suits took place in the year 1878. Appu and Francisco Fernando, the two principal defendants, purchased of the Crown agents two arrack rents, each of which gave them a monopoly of selling the native liquors, arrack rum and toddy, for the year ending on the 30th June, 1879, within a certain district called a rent division. The purchase-money was to be paid in twelve instalments, and was secured by mortgage bonds given by the defendants to the Queen. The third defendant Juan Fernando is a surety for the others.

In the earlier action numbered 83,316 the Queen's Advocate on behalf of the Crown sued for Rs.29,783. 34 cents, and in the later action numbered 83,320 for Rs.30,216. 66 cents, being

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(1) 7 Price, 145, 192, 199.
(2) Law Rep. 10 Q. B. 31.
(3) 1 Y. & C. Ex. 197.
(4) 6 Price, Ex. 411.

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respectively the balances due on account of the two rents. The defendants do not deny that the balances sued for are unpaid and would be due if there were nothing to set off against them. But they allege that the Crown has broken its engagements to them in connection with the arrack rents, and that they have thereby suffered damage which they are entitled to have ascertained in these actions and to enforce against the Crown in reconvention.

In action 83,316 the District Judge found that the defendants had suffered damage to the extent of Rs.4500, and therefore that the Crown could recover only the amount of the rent minus the damage, viz. Rs.25,283. 34 cents. In action 83,320 he found that the defendants had suffered damage to the extent of Rs. 70,000, which exceeded the claim of the Crown by Rs.39,783. 66 cents. He then set the results of the two actions against one another, and made a single decree condemning the Crown to pay the defendants the sum of Rs.14,500. 32 cents.

The Crown appealed to the Supreme Court in both actions, and that Court made separate decrees. In action 83,316 they held that the defendants had not made out any case in reconvention, and they decreed to the Crown the whole sum claimed for it. In action 83,320 they held that the defendants had proved damages to the extent of Rs.37,031. 25 cents, which exceeded the claim of the Crown by Rs.6814. 91 cents and for that sum they gave the defendants a decree.

The defendants have now appealed to Her Majesty in Council from both decrees of the Supreme Court, seeking in effect to restore the decision of the District Judge. And the Crown has appealed in action 83,320, seeking to have the claims in reconvention entirely disallowed.

The claims made in reconvention in action 83,316 may be stated as follows:—That the profits of arrack taverns were diminished by the action of licensed liquor shops, which are shops for the sale of imported liquors; that the sums offered for arrack rents diminished accordingly; that Francisco Fernando addressed the Governor to that effect; that the Governor, in answer, stated, on the 15th May, 1878, that, "The Government will aid in the suppression of the sale of intoxicating liquor of every kind in districts where the establishment of arrack taverns is prohibited;" that on the 10th June, when the rent was put up to auction, Mr. Templer the Government Agent, promised to the bidders present that licenses would not be issued to retail liquor in places where there were no taverns within the arrack districts; that, on the 12th June, 1878, Mr. Le Mesurier, the Government Assistant Agent, urged Appu to purchase the rent, and promised him not to issue licenses for liquor shops in certain places; that on 14th June, when the rent was actually purchased by private contract, Mr. Templer said to Appu, "You will have a good profit, because licenses to sell other liquors would not be issued;" and that licenses had been issued in contravention of the four promises so made.

With regard to the Governor's statement of the 15th May, the evidence as to the amounts bid for the rents leaves it at least doubtful whether the defendants placed any reliance on it. But whether they did or did not, it was no contract. Fernando was not offering anything to the Government, or bound by anything when the Governor had written to him. There was no bargain then in contemplation. The Governor did nothing more than indicate the line of policy which the Government desired to take just as he did when he told Mr. Templer, as that gentleman states in his cross-examination, that, "if the planters wanted to go in for temperance they shall have it; that if they would allow no taverns on their estates, the Government would not allow liquor shops." Moreover there is not any statement by the Governor that licenses shall not be issued in any given place; he only says that Government will aid in the suppression of the sale of liquors; and for aught that appears the Government have always been willing to do that so far as circumstances admit.

The next promise relied on was that of the 10th June. It was not alleged in the defendant's answer, and the Supreme Court disregarded it on that account. But evidence on the point was given on both sides, and it was discussed before the District Judge and decided by him in favour of the defendants. Their Lordships therefore think it more satisfactory not to exclude the discussion on appeal.

Three witnesses depose that Mr. Templer used the expressions which the Defendants rely on, Appu himself, Pedro Peresa, and Mathes Peresa. But Appu and Mathes do not understand English, and Pedro only understands English a little, though he says that he knew what the agent said. He adds, "the agent spoke in English, and the Kachcheri Mudaliyar interpreted to us." It is clear that if the parties relied on what was then said, they must have relied on the interpreter.

Mr. Templer does not deny that he said something on the point. He does not recollect it, but says that if he said anything he simply conveyed the Governor's instructions. What those were he stated on cross-examination in the terms above quoted.

We are therefore reduced to the evidence of the interpreter. He says, "On that occasion the Government agent asked me to tell the renters that licenses would not be issued to sell foreign liquors in places where taverns had been suppressed." But immediately afterwards he adds, "One of the bidders came forward and asked the agent whether he would promise not to issue fresh licenses for the sale of foreign liquor, and the agent said he could make no such promise."

The probability is that there was some conversation on the point, no doubt an important point to bidders, and that Mr. Templer made some declaration of the intentions of the Government similar to what is stated by him, and in the letter of the 15th May. But it is very difficult to say that any undertaking which any bidder had a right to rely on was given on behalf of the Crown. Be that as it may, it is certain that no bargain was struck on this occasion. Only Rs.140,000 was bid and the auction failed. An entirely fresh negotiation with Appu was entered on, which resulted in his offering Rs.181,300, and in the sale of the 14th June. The talk of the auction room on the 10th cannot be imported into the private contract of the 14th.

The promise which Mr. Le Mesurier is said to have made on the 12th June was in the course of a private conversation between himself and Appu. He flatly denies it. It is in itself an improbable thing to have come from a sub-agent. Appu's credit is so damaged by his denial of a letter (exhibit Y) which he undoubtedly wrote, that there is no difficulty in disbelieving him, and their Lordships concur with the Supreme Court in so doing.

The last promise relied on is that of the 14th June. Appu, who was in the room and transacting the business with Mr. Templer, swore to what he said in the terms which have been stated above. Francisco says that he stood at the door, and overheard what was said, but he does not mention any declaration by Mr. Templer on the point in question. According to him Appu said that, "as he knew then the Governor's reply, he would not mind giving" a larger price. We have then to go to the interpreter, on whom Appu must rely for what Mr. Templer said, and he tells us that "no mention whatever was made about licenses." Mr. Templer also denies any promise.

Even if stronger evidence had been given of the promises relied on by the defendants, there are two circumstances which would shake it greatly. One is that in the letter, Exhibit Y, which was written by Appu to the Government Agent on the 8th of June, he attributes the low prices offered for arrack rents, not to the competition of liquor shops, but to a combination of those who have "a strong hold on the arrack farms," and who have, he says, formed themselves into a body for the auction of the 10th instant. And he takes credit to himself for acting in the interests of the Government, and against those of the ring, by making higher offers, but begs that his proceedings may be kept quite secret. The other circumstance is that the defendants never insisted or even asked that this important undertaking should be introduced into the written contract, which was signed on the 14th of June, and was supplemented by the mortgage bond of the 28th of June.

Their Lordships do not find it necessary to discuss the questions much dwelt on at the bar, whether the case made by the defendants is a collateral contract, or a representation on which the defendants entered into the written contract. They think with the Supreme Court that no contract or representation is proved at all in reconvention, and that the appeal in action 83,316 wholly fails.

In action 83,320 precisely the same case was made in reconvention with respect to liquor licenses, and the District Judge awarded Rs.30,000 as damages. The Supreme Court, thinking the case

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was not proved, struck out the whole of that sum. They also reduced the sum of Rs.40,000 awarded by the District Judge as damages on another part of the case in reconvention which has yet to be stated. But the appeal of the defendants is confined to the question of the liquor licenses. It therefore wholly fails for want of proof.

Their Lordships now turn to the appeal of the Queen's Advocate, which raises questions both of fact and law, and they will take the facts first.

The 6th article of the conditions of sale, which constitute the written contract between the parties, runs as follows:—"Licenses to sell arrack rum and toddy by retail at the taverns enumerated in the lists hereto annexed, marked A, shall be granted on the application of the renter to such persons as he may desire." List A is a list of twelve towns, villages, or places numbered consecutively from 1 to 12. The ninth place is entered in the list as "9, Kadyanlina:" a town of some little importance.

There had previously been a tavern licensed for a house in the bazaar of Kadyanlina, whether numbered 9 or not does not appear. The house was built on land belonging to Mr. Elphinstone, a coffee planter, who owned the whole bazaar and a large part of the neighbouring land. He was hostile to taverns, and having got possession of the site forbad the use of it as a tavern. The exact time at which this was done does not appear, but it was some time before the abortive auction of the 10th of June.

In his evidence Mr. Templer tells us how the matter stood. He says, "One of the taverns in the Bulatgama Division was Kadyanlina tavern. On the 10th of June I distinctly told the renters who had assembled to bid that there would be difficulty in getting a site for a tavern there. That Mr. Elphinstone would not allow any site in the Kadyanlina bazaar to be used for the purposes of a tavern. . . . I told the renters that if they could get another suitable site within that locality I would give them a license."

On the 29th of June a license was issued by Mr. Templer to sell arrack rum and toddy during the month of July "at the tavern No. 9 situate at Kadyanlina, and at no other place." This license was ineffectual because neither the old site nor any other site

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could be procured in July. What is important to observe is that the license was issued for something called "Tavern No. 9 at Kadyanlina," though it was well known to the Government Agents that the very house which was formerly used for the purpose was not then used or available for it.

At this point the case is complicated by attempts on the part of the defendants to transfer the Kadyanlina tavern to Maskeliya, some twenty miles off. They presented several petitions for this purpose, which were refused. The only bearing which these proceedings have on the question now to be decided is that the Government, which steadily refused to grant any license for Maskeliya, admitted that one should be granted for the neighbourhood of Kadyanlina.

In the month of August the defendants procured a site in the town of Kadyanlina, which adjoined the site of the old tavern. On the 30th of August they applied to the Government Agent to "grant the license No. 9 for the tavern of Kadyanlina, to establish the same tavern at the adjoining place where it has been established in the last year." Similar petitions were presented on the 3rd and the 17th of September.

What was done on these petitions appears from the evidence of Mr. Le Mesurier and Mr. Templer. Mr. Templer was under the impression, which has been found by both Courts to be incorrect, that the new site was not in Kadyanlina, but a mile or a mile and a half distant. He evidently thought that he was not bound to grant any license for a tavern so situated, except under the promise that he made to the renters on the 10th of June, which left him to be the judge what was a suitable site. He reported to the Governor that he never refused to license another site for a tavern in the vicinity of the old tavern at Kadyanlina. But, in point of fact, he did so refuse. He refused a license to the defendants for the site they had procured, for the sole reason that Mr. Elphinstone objected to it and therefore the site was not suitable.

The question now is whether by that refusal the Crown has broken the written contract. It is said that the answer of the defendants sets up only a collateral parol contract, which is not proved in fact, and could not be proved in point of law. But it appears to their Lordships that the answer relied on both contracts, and that the defendants, though unable to make anything of the Maskeliya episode, have a right to rest their case on the written contract.

The 6th article is capable of two constructions; one being that licenses were to be granted for certain houses then used as taverns; and the other being that licenses were to be granted for a tavern in each of the specified towns and places in List A. Neither construction is quite literal, and to determine which is the true one it is necessary to look at the subject-matter of the contract. Now, to the knowledge of both parties, there was at the time of the contract no tavern at all at Kadyanlina, and the contract would have no meaning if it were taken to refer to an existing tavern. The parties must be deemed to have contracted on the 14th of June with reference to existing facts, and the language of Mr. Templer on the 10th of June shews that the salient facts present to their minds were that there was no immediately available site for a tavern, no reasonable chance of procuring the old site, and a difficulty in procuring another site in Kadyanlina.

So reading the contract, the clear duty of the Crown was to grant a license when a site in Kadyanlina was procured, unless it could be proved that some substantial objection existed to it. The Crown had not, as Mr. Templer supposed, an arbitrary discretion to say what was a suitable site. Mr. Elphinstone's hostility was not a substantial objection to the performance of a legal obligation to grant a license for a site in Kadyanlina, as indeed Mr. Templer himself must have thought when he did grant the license for the old site.

On these grounds their Lordships concur with both the Courts below in thinking that there has been a breach of contract. It remains to consider the legal objections urged by the Crown against the defendants' right to recover damages.

The argument on behalf of the Crown may be thus condensed. A claim in reconvention is in substance nothing else than a cross action brought by the defendant against the plaintiff; to sustain such a claim the defendants must shew that they can maintain a suit against the Crown; no such right existed under the Roman-Dutch law, which is the law of Kandy; even if it did it would have been abrogated by the conquest of the country, being one of those rights which must of necessity be varied by a change of sovereign power; there has been no subsequent establishment of the right; a practice of suing the Crown has arisen, but it is irregular and cannot be upheld unless warranted by law, and no law can be found which confers the right. Even if there were the right of suit, it is argued that it would not warrant such a decree as the Court has made, for though the Court says that a judgment against the Crown does not carry execution with it, it has in fact given execution to the extent of the debt due to the Crown by setting off the two claims and so wiping out the debt. These arguments were enforced at the Bar with great learning and ability.

The maritime provinces of Ceylon were part of the dominions of the United Provinces, and were acquired by conquest by the British Government in 1799. The law in force before the time of the conquest must have been the Roman-Dutch law of Holland, probably with some modifications. On the conquest the King of England might have abrogated the old law and have introduced the English law. He did not do so, but continued the old law with modifications, reserving to the King and to the East India Company power to make other alterations. The interior of the island, then the kingdom of Kandy, was not conquered till 1818, after which the law of the maritime parts was extended to the interior.

One of the laws of Ceylon, which differed from the English law, was that of reconvention, and it is not disputed that, as between subject and subject, that law of reconvention is in force. The question now is whether the same law is in force between the Judge Advocate suing for the Crown and a subject.

It may be assumed in favour of the Crown that for the purpose of trying whether the counter-claim can be made at all there is no distinction between a claim in reconvention and an original action. And if it cannot be shewn that the right to bring such an action existed under the Roman-Dutch law, a legal foundation for it, if found at all, must be found in transactions subsequent to the conquest of the country.

The defendants contend that there was a power given by the Roman-Dutch law to sue the officer of the Government on behalf of the Government, and that this power has been preserved, the style of the officer alone being changed into the Queen's Advocate. They do not allege that when judgment is given for the subject against the Queen's Advocate execution can be issued against his person or private property, nor even against the property or revenue of the Government; but they say that, though the judgment cannot be thus enforced, the subject has a right to have it ascertained by a Court of Justice that he has a debt which the Government ought to pay, and to have the benefit of the strong moral pressure that there would be on the Government to provide for payment of the debt thus ascertained. Such a suitor would thus be much in the position of a subject in England who on a petition of right has obtained a judgment in his favour, but can only obtain the fruits of his judgment by the grace of the Crown and the assistance of Parliament.

In support of the plaintiff's argument, it was contended that it was not possible to suppose that any Government, or at least any monarchial Government, would submit to the indignity of being sued, even through its officers. That, however, is not an impossible supposition. In the *King's Advocate* v. *Lord Dunglas* (1), Lord Medwyn enters into a very learned discussion as to the early history of the mode of procedure in Scotland. He states at p. 325 that in very early times the King of Scotland sued in person in civil suits, but that afterwards he sued by his officers of state, and at p. 333, when discussing how the King was to be sued, Lord Medwyn says:—

> "His officers are cited instead of the Sovereign, and to defend his interest, on the ground that it was thought improper to call the King personally into Court. The rule however was not extended to the Regent. Thus the Queen Regent is defender in

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(1) 15 Court Sess. Cas. 1st Series, 314.

a reduction of a forfeiture in 1558, John Duke of Albany in 1525, and James Earl of Arran in 1543, along with the treasurer and advocate, or (and?) the donators, the persons having interest."

There certainly seems no more antecedent reason why the Counts of Holland should be exempted from suit through their officers than existed for the exemption of the King of Scotland. And though it is very likely that whilst great potentates, like the Dukes of Burgundy and the Kings of Spain, were Counts of Holland, it would not be very safe to sue them, yet when the United Provinces became independent, suitors might find themselves more favourably placed.

But whatever speculations may be made upon these points their Lordships cannot advise Her Majesty that such was the Roman-Dutch law, unless it is shewn to them that it was so. And neither the researches of counsel nor their own have enabled their Lordships to attain any certainty on the subject.

That a very extensive practice of suing the Crown has sprung up is certain. In his judgment in the case of Fernando, which was decided immediately before the present case came under review Cayley, C.J., says, "The practice has been recognised in many hundreds of decisions, and long acquiesced in by the Crown, and, so far as I am aware, has not till now been called in question." It was recognised by the judgment of the Court in *Fraser's Case*, decided in the year 1868.

In Mr. Justice Thompson's Institutes of the Laws of Ceylon, after referring to the English petition of right, he says that, the Ceylon Government having no Chancellor, a suit against the Government has been permitted, and the Queen's Advocate is the public officer who is sued on behalf of the Crown. He then points out that, except in land cases, this action gives little more than is given by the petition of right, for no execution can issue against the Crown or against the Queen's Advocate.

It is true that in *Palmer* v. *Hutchinson* (1) it is stated that no practice of the Court can confer upon it any power or jurisdiction beyond that which is given to it by the charter or law by which

(1) 6 App. Cas. 619.

it is constituted. But in Natal, where that case arose, the jurisdiction of the Court was founded on an Ordinance dated the 10th of July, 1857, and extended only over all Her Majesty's subjects and all other persons whomsoever residing "and being within the colony." And this case possesses a feature which is not found in *Palmer* v. *Hutchinson* (1), viz., that the practice of suing the Crown has been recognised by the legislature.

The 117th section of Ordinance No. 11 of 1868 runs as follows:—

> "All suits instituted in the name of the Queen's Advocate on behalf of the Crown, for the recovery of any debt, damages, or demand, or to obtain possession of any property, provided the amount or value in dispute exceeds ten pounds, may be instituted and prosecuted, at the discretion of the Queen's Advocate, in the District Court held at the principal town of the province in which the defendant resides, or in which the cause of action shall have arisen wholly or as to any part, or in which such property is situated; and all suits instituted by any private party against the Queen's Advocate wherein the amount or value in dispute exceeds ten pounds, shall, unless the Queen's Advocate consents to forego such right, be instituted and prosecuted in the District Court held at the principal town of the province in which the act, matter, or thing in respect of which any such suit shall be brought shall have been done or performed, or in which the property in dispute is situated; and the said District Court shall have cognizance of and power to hear and determine such suits as if the cause of action had arisen within the district."

It appears to their Lordships that the latter part of that section would be deprived of its meaning unless it is held that, in the view of the legislature, suits might be instituted by private persons against the Queen's Advocate for the recovery (amongst other things) of debts and damages. It is said that to give that meaning to the Ordinance would prove too much, for it would include actions for damages ex delicto, which, as everybody admits, cannot be brought against the Crown. But it does not follow that, because the words are wide enough to include actions ex delicto, they must do so. They are not words adapted to confer a new right or to establish a new kind of suit. They are only regulative of rights and proceedings already known, and they must be construed according to the state of things to which they clearly refer. They can, therefore, receive a full and sufficient meaning without extending them to actions ex delicto, but they cannot receive a full and sufficient meaning, indeed, it is difficult to assign them any substantial operation at all unless they embrace actions ex contractu.

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(1) 6 App. Cas. 619.

It is then certain that prior to 1868 there was such an established practice of suing the Crown that the legislature took it for granted and regulated it. The same state of things must have existed prior to 1856, for the Ordinance of 1868 is only a re-enactment of an earlier Ordinance of 1856. Earlier Ordinances still have been referred to, but their Lordships do not discuss them, because, though they speak of suits in which the Crown is defendant, and though it is the opinion of the Supreme Court, and is probable, that they refer to claims ex contractu, it is not clear that they do so.

It would certainly be inconvenient that there should be no means of obtaining the decision of a Court of Justice in Ceylon on claims made by the subject against the Crown. Yet there are none if actions of this kind do not lie, for the petition of right does not exist in the colony. In the present case the consequences would be somewhat startling. The Crown would be able to sue the subject on one portion of a contract, while itself violating with impunity another portion of the same contract; and the subject must pay for the breach which he has committed, while recovering nothing for the breach by which he has suffered. Whatever may be the exact origin of the practice of suing the Crown, it was doubtless established to avoid such glaring injustice as would result from the entire inability of the subject to establish his claims. And finding that the legislature recognised and made provision for such suits at least twenty-eight years ago, their Lordships hold that they are now incorporated into the law of the land.

It remains to consider whether the decree does right in setting off the defendants' claim against that of the Crown, or whether separate judgments should be given for each amount, leaving the sum awarded to the defendants to be recovered only as a matter of grace on the part of the Crown.

It is true that the course taken by the Courts below does practically give an effective execution against the Crown to the extent of the Crown's claim against the defendants. But though the Crown is thereby prevented from recovering its debt, it is not exposed to the indignity attendant upon process of execution. Some analogy to this question may be found in the cases which decide that a foreign sovereign may be sued in the Court of Chancery by way of defence or cross claim, though he cannot be sued unless he himself has first invoked the jurisdiction of the Court. In the case of *The Duke of Brunswick* v. *King of Hanover* (1), the principle of this doctrine was very fully discussed by Lord Langdale. In the course of his judgment he says:—

"The liability of a foreign sovereign to be sued in a case where he himself was suing here, was considered to be founded upon the principle that by suing here he had submitted himself to the jurisdiction of the Court in which he sued. The decision is in accordance with the rules of the civil law. The reconventio is a species of defence, and 'Qui non cogitur in aliquo loco judicium pati, si ipse ibi agat, cogitur excipere actiones et ad eundem judicem mitti.'"

A further analogy may be found in the practice of the Court of Admiralty affecting cases of collision where both parties are to blame. There, though the damage suffered by each is ascertained by a separate process, no monition is issued except for the moiety of the balance awarded to the one who has suffered the greater damage. And that rule is followed though the amount actually payable by one of the parties is materially affected by it, as it would be when the other is insolvent. This principle is illustrated by the case of *The Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Company* (2).

In this case the suit is brought by the Queen's Advocate on a

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(1) 6 Beav. 1.

(2) 7 App. Cas. 795.

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contract made between the Crown and a subject. The parties have contracted on a footing of equality. It would lead to injustice if, when brought into Court by the Crown, the subject should not be able to resist payment of anything but that which, on the balance of the debt or damage recoverable under the contract by each party, is found due to the Crown.

The Crown suffers no more indignity or disadvantage by this species of defence than it would suffer by defences of a more direct kind, which yet would be clearly admissible: as, for instance, if a breach of contract sued on by the Crown were excused on the ground that the wrongful action of the Crown itself had led up to that breach.

For these reasons their Lordships consider that the judgment of the Supreme Court on this point must be upheld.

The result is that each of the three appeals ought to be dismissed with costs, and their Lordships will humbly advise Her Majesty accordingly.

Solicitors for Hettihewage and others: *Baker & Nairne.*
Solicitors for the Queen's Advocate: *Sutton & Ommanney.*

[PRIVY COUNCIL.]

IN THE MATTER OF BRANDON'S PATENT.
Ex parte DOTY.

J. C.*
1884
June 10.

Patents, Designs, and Trade-marks Act, 1883 (ss. 25, 113)—*Practice—Petition.*

Held, that the enactments of 46 & 47 Vict. c. 57, do not affect any patent granted before the commencement of the Act, nor any right or privilege which had accrued to the patentee before or at the commencement of the said Act, including the privilege of applying for a renewal.

THIS was a petition filed on the 23rd of May, 1884, by *Henry Harrison Doty,* who, on the 31st of October, 1870, had by his agent *Brandon*, since deceased, obtained letters patent for his invention of "improvements in the means or apparatus for producing the more complete combustion of gas, paraffin, and other hydro-carbon oils," praying for a prolongation for fourteen years or other less term, from the 31st of October, 1884, the date of its expiration.

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* *Present:*—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

Sect, 25 of 46 & 47 Vict. c. 57, enacts:—

A patentee may after advertising, in manner directed by any rules made under this section, his intention to do so, present a petition to her Majesty in Council, praying that his patent may be extended for a further term; but such petition must be presented at least six months before the time limited for the expiration of the patent.

Sect. 113 enacts:—

The enactments described in the 3rd schedule to this Act are hereby repealed. But this repeal of enactments shall not

(*a*) Affect the past operation of any of those enactments or any patent or copyright, or right to use a trade-mark granted or acquired, or application pending, or appointment made or compensation granted or order or direction made or given, or right, privilege, obligation or liability acquired, accrued, or incurred or anything duly done or suffered under or by any of these enactments before or at the commencement of this Act.

Swinfen Eady for the Petitioner.

R. S. Wright for the Crown.

The judgment of their Lordships was delivered by

Lord Watson:—

Their Lordships are of opinion that the first of these petitions is informal, and cannot be sustained, whether it be viewed as a petition presented under the Act of 1883, or under the previous statutes. But their Lordships have come to the conclusion that the petition presented upon the 23rd of May, 1884, ought to be received. It is obvious that the petition would not be competently

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presented if the enactments of sect. 25 of the last Patent Act applied. But their Lordships are of opinion that those enactments do not apply, and that the proceeding falls within the exceptions introduced by the 113th section of the statute of 1883. The provisions of sub-sect. A of that Act must be read distributively, and if so read they declare that the enactments of the new statute shall not affect any patent granted before the commencement of the Act, and they also declare in express terms that those enactments shall not affect any right or privilege which had accrued to the patentee before or at the commencement of this Act. Now the patent which was held by the present Petitioner at the passing of this Act of 1883, was an exclusive right to use a certain invention for a definite period of time; but, as incidental to that right, he had, by virtue of the provisions of the Act 5 & 6 Will. 4, c. 83, the further privilege of leave to apply for a prolongation of his patent, at any time before its expiration, upon such grounds as commended themselves to this Board. That right had accrued to him. He was in a position, if he had chosen, to make the application at the date when the new statute came into force; and their Lordships find it impossible, looking to the precise terms of sect. 113, to hold that that privilege, which was incident to and part of his patent right, was taken away by the provisions of the new Act, or rather they find it impossible to hold that it is not a right included in the express reservation made by sect. 113. They will, therefore, direct that the petition be received and the usual procedure followed.

Solicitor for Petitioner: *S. R. Bastard.*

[PRIVY COUNCIL.]

J. C.*

1884

July 8.

In re NEWTON'S PATENTS.

46 & 47 *Vict. c.* 57, *s.* 25, *cl.* 4—*Accounts of Foreign Profits.*

Held, that 46 & 47 Vict. c. 57, s. 25, cl. 4, does not alter the rules adopted by the Judicial Committee. It is the duty of a patentee applying for a prolongation to produce accounts of all the profits received under foreign patents in respect of his invention.

THIS was a petition by Tilghman's Patent Sand Blast Company, Limited, to extend the term of certain letters patent, dated the 1st of August, 1870, No. 2147, which had been granted to Alfred Vincent Newton in respect of an invention of "improvements in cutting, boring, grinding, and pulverizing stone and other hard substances," being a communication from abroad by Benjamin Chew Tilghman, of Philadelphia, in the state of Pennsylvania, United States of America; and also of letters patent, No. 2900, granted the 3rd of November, 1870, supplemental thereto.

Aston, Q.C., *Bousfield*, and *Waggett*, for the petitioner.

The *Attorney-General* (Sir *H. James*), *Wright*, and *Danckwertz*, for the Crown.

Webster, Q.C., and *Macrory*, for Messrs. Loates, Abbott, & Co., and Messrs. Siemens.

Lawson, for Messrs. Wright & Butler.

Chadwyck Healey, for Messrs. Pilkington.

Reference was made to *In re Johnson's Patent* (1).

* *Present*:—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

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(1) Law Rep. 4 P. C. 75.

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In re NEWTON'S PATENTS.

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

In this case the petitioners, the Tilghman Patent Sand Blast Company, Limited, are the assignees of Tilghman's English patents, and it appears by their petition that Tilghman held patents in France, Austria, Belgium, Italy, and the United States; and for the present purpose no distinction can be drawn between the petitioners and Tilghman himself. Objections were made to the petition by various parties, and one of them (advanced by the Messrs. Pilkington) was to this effect, that Tilghman, or the persons for the time being owners of the authorized invention, had obtained with them all like privileges for the monopoly or exclusive use of the said authorized invention in certain foreign countries and British colonies which had been allowed to or were about to expire; and that insufficient information is afforded by the petition as to such patents or privileges; in point of fact the petition is entirely silent with regard to any profits obtained upon the foreign patents. The petition was not amended after those objections were put in, and when the accounts are brought up in support of the petition it is found that they do disclose what has been received in respect of the Belgian and French patents, but say nothing about the Austrian, Italian, or the United States patents. Now the reason given for that is, that by the new Patent Act of last year the practice of this Committee has been altered, and that it is not necessary for the petitioner to produce the accounts relating to foreign patents; and this is the section which is relied upon: "The Judicial Committee shall in considering their decision have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case." Now it is quite true that in that section one particular class of profits is specified as something absolutely necessary to consider. There is nothing whatever in the section to say or to intimate that the Committee shall not look at other classes of profits, but they are to look "to all the circumstances of the case." It is difficult to suppose that the Legislature could have intended to alter the rules adopted by this Committee, resting on no previous enactment but on what was found to conduce to the justice of the case and the public convenience. Their Lordships are of opinion that no such alteration is made by the statute; and that looking now, as they looked before, to all the circumstances of the case, they find it to be a very material circumstance that they should know what has been received by way of profit on the same invention in foreign countries. It may be the determining point of the case, it may prove not to be so, but that is a point on which the Committee must form their own judgment, and it is for the petitioners to supply them with materials for that purpose. That being so, the only question that has now to be decided is whether there shall be an adjournment of this case for the purpose of allowing the petitioners to mend their case. Now this petition was to have been heard on the 10th of last month. At the petitioners' desire it was postponed to the present day. Now the petitioners propose that there shall be an adjournment for some period in order that they may furnish the accounts which they have neglected to produce—in effect, in the face of the objections, refused to produce up to the present time. It is obvious that at this period the patent expiring on the 1st of August, the opponents would have a very short time in which they could test the genuineness and the propriety of those accounts. Their Lordships think that in a cumbrous case of this kind, with many opponents who meet here at great trouble and at great expense, the petitioners must bear the consequences of their refusal to produce the accounts. They decline to allow any adjournment, and the petition must be dismissed. Their Lordships think that the parties are entitled to some costs, but that there should be only one set of costs between them, and the Registrar will determine what they are to be.

Solicitors for petitioners: *Cooper & Walker.*

Solicitors to the Treasury for the Crown.

Solicitors for the opponents: *Burton, Yeates, Hart, & Burton; Wynne & Son; Ingle Cooper & Co.; Johnson, Budd, & Co.*

[HOUSE OF LORDS.]

THE BRIERLEY HILL LOCAL BOARD . APPELLANTS;

AND

JOHN PEARSALL . . . . RESPONDENT.

H. L. (E.)
1884
March 17.

Public Health Act 1875 (38 & 39 *Vict.* c. 55) ss. 179, 180, 308—*Arbitration under the Act—Jurisdiction of Arbitrator when Liability under the Act is bonâ fide disputed.*

When a claim for compensation is made against a local authority for damage caused by the exercise of the powers conferred upon them by the Public Health Act 1875, the arbitrator has jurisdiction to hold the arbitration and make his award as to the fact of damage and the amount of compensation under sects. 179, 180, and 308, although the local authority bonâ fide dispute their liability to make compensation at all under the Act. Their proper course is to raise the question of liability in their defence to an action upon the award.

So *held*, affirming the decision of the Court of Appeal.

APPEAL from an order of the Court of Appeal (1).

The respondent was the owner of a house and premises at Brierley Hill, within the urban sanitary district of the appellants, who were the urban sanitary authority under the Public Health Act 1875. The appellants in July and August 1881 made alterations in the soil and level of the street in front of the respondent's premises. In December 1881 the respondent, under sects. 179, 180 of the Public Health Act 1875 (38 & 39 Vict. c. 55) appointed an arbitrator on his behalf to determine the amount of the compensation to be paid to him by the appellants for damage caused to him by their raising the level of the street, and gave the appellants notice thereof. The appellants denied their liability, and did not appoint an arbitrator on their behalf, but attended the appointment made by the respondent's arbitrator under protest, and denied their liability and disputed the fact of damage. The respondent's arbitrator by his award adjudged that the appellants in exercise of the statutory powers conferred upon them by sect. 149 of the Public Health Act 1875 raised the level of the street in front of the respondent's house and thereby interfered with the access, and awarded to him £234 10*s.* 8*d.* as compensation, with all costs.

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(1) 11 Q. B. D. 735.

The respondent having brought an action against the appellants upon the award for the amount awarded and the costs, the appellants disputed the damage in fact, and alleged that in making the alterations in the street they were not acting under the powers conferred by sect. 149 of the Public Health Act 1875, but were merely exercising their powers as surveyors of highways, and contended that where the liability to pay the compensation is bonâ fide disputed there is no power under that Act to appoint an arbitrator to determine the fact of damage or the amount of compensation under sect. 308 until the liability is ascertained (1).

Bowen L.J. (who tried the case without a jury) upon the question of fact held that the appellants had acted not only as highway surveyors, but also as the local board under the Public Health Act, and determined that question in favour of the respondent. But upon the question of law his Lordship held that inasmuch as there was a bonâ fide dispute as to the legal liability of the appellants, the resort to arbitration was premature until the liability was ascertained, and entered judgment for the appellants.

The Court of Appeal (Brett M.R., Lindley and Fry L.JJ.) reversed this decision and entered judgment for the respondent for the amount claimed in the action (2).

March 14, 17. *A. R. Jelf* Q.C. (*R. Kettle* with him) for the appellants:—

The appeal will succeed if any one of the three following propositions is established:—1. If liability is bonâ fide disputed the arbitrator has no jurisdiction; 2. If in order to determine the damage the arbitrator must determine the liability he has no jurisdiction; 3. If the award on its face determines the liability it is bad. That the first proposition is true is apparent from a study of sects. 179, 180, 181, and 308 of the Public Health Act. The decisions on the Lands Clauses Consolidation Act 1845 will be relied on by the respondent, but should not be extended to the Public Health Act, which is different in scope, spirit, and language. It is much more convenient to have the question of liability determined first, and that consideration should prevail unless the statute expressly declares otherwise. The arbitrator has in this award determined the question of liability, and as that appears on the award it is clearly bad. The appellants' contention is strongly supported by the decisions in *Reg.* v. *Metropolitan Commissioners of Sewers* (1), in 1853; *Bradby* v. *Southampton Local Board* (2), in 1855, where the true test was laid down by Crompton J.: *Reg.* v. *Burslem Local Board* (3), in 1859. A bonâ fide dispute of liability is sufficient to oust the jurisdiction of the arbitrator: *Burgess* v. *Northwich Local Board* (4). *Bradford Local Board* v. *Hopwood* (5) is contrary to the other cases and wrong. Local boards acting for public purposes alone are not on the same footing as railway companies acting for gain. No amount being mentioned in the claim for compensation it was bad.

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(1) Sect. 308: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of £20, the same may at the option of either party be ascertained by and recovered before a Court of summary jurisdiction."

(2) 11 Q. B. D. 735.

[The following cases were also cited:—*Reg.* v. *Wallasey Local Board* (6); *London and North Western Railway Company* v. *Smith* (7); *East and West India Dock Company* v. *Gattke* (8); *Ex parte Rayner* (9); *Rhodes* v. *Airedale Drainage Commissioners* (10); *Reg.* v. *London and North Western Railway Company* (11); *Burgess* v. *Northwich Local Board* in a later stage: an action on the award (12).]

(1) 1 E. & B. 694.
(2) 4 E. & B. 1014, 1021.
(3) 1 E. & E. 1077, 1088.
(4) 37 L. T. (N.S.) 355.
(5) 6 W. R. 818.
(6) Law Rep. 4 Q. B. 357.
(7) 1 Mac. & G. 216, 221.
(8) 3 Mac. & G. 155, 169, 173.
(9) 3 Q. B. D. 446.
(10) 1 C. P. D. 402.
(11) 3 E. & B. 443, 464.
(12) 6 Q. B. D. 264.

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F. A. Bosanquet Q.C. and *A. T. Lawrence* for the respondent, were not heard.

EARL OF SELBORNE L.C.:—

My Lords, in this case there really appears to me to be nothing in favour of the claim made by the appellants except for some observations which were made in two of the authorities to which we have been referred, namely, in the case of *Reg.* v. *Metropolitan Commissioners of Sewers* (1), and in the case of *Reg.* v. *Burslem Local Board* (2). But for those observations I should think that it was impossible to distinguish the clause in the Public Health Act from the clause in the Lands Clauses Consolidation Act, upon which, as has been very fairly and properly admitted, there has been a series of decisions which have practically put an end to every question of this kind. The Lands Clauses Consolidation Act, in s. 68 begins with the words, "If any party shall be entitled to any compensation" under the Act either for lands taken or for lands injuriously affected, and provides that in that case a certain course shall be followed. That course, shortly stated, is this:—if either party wishes to have the amount of compensation determined by arbitration he may have it so done, in precisely the same way as under the Public Health Act, that is to say, if the parties cannot agree upon the nomination of one or more arbitrators there may be two arbitrators, one to be nominated by each party; but if the person claiming compensation nominates an arbitrator and the other party fails to nominate one on his side, then the single arbitrator nominated by the party making the claim is to be in the same position as if both parties had agreed to a sole arbitrator. That is exactly the mode of arbitration provided by the Public Health Act. So far there is no difference whatever between the two Acts; and if the differences which there are in the phraseology are to be regarded as of any importance, I confess it seems to me that the argument in favour of the view presented by the appellants here would be stronger upon the phraseology of the Lands Clauses Act than it is upon the phraseology of the Public Health Act of 1875; because s. 68 of the Lands Clauses Consolidation Act begins with the words, "If any party shall be entitled to any compensation," and it might be plausibly said that the proof of the title to compensation is a condition precedent to all the things which are to be done in order to ascertain the compensation to which the party is entitled; whereas here the legislature has said, "Where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers, and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration." Well, here at all events the right to compensation is introduced by reference not to a matter of law, the title to compensation, but to a matter of fact, the sustaining of damage, which matter of fact is most distinctly put within the power of the arbitrators as well as the question of amount. Therefore it strikes me that this clause is worded in a manner more unfavourable to the argument of the appellants than the Lands Clauses Act. No doubt there is this difference, pointed out on behalf of the appellants by their able counsel, that the Lands Clauses Act does not say that full compensation shall be made and then go on to determine the way in which it is to be ascertained, but it treats the way in which it is to be ascertained as the mode of making compensation where the title to it does exist. Well, I agree that it is so; and if here any other mode of ascertaining the compensation had been provided except that which is found in the immediate context of the same clause, or if no mode at all had been provided, the observation would have had some force; but a mode is provided, which is by arbitration; and the arbitration is to be upon "any dispute as to the fact of damage or amount of compensation."

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(1) 1 E. & B. 694.

(2) 1 E. & E. 1077.

Now, on ordinary principles of construction, laying aside entirely the prior authorities, I should have thought that it was plain there, that two things were meant at all events to be the subject of inquiry by the arbitrators; the first, "the fact of damage," the second, the "amount of compensation" when damage there was. What is meant by "damage"? On common principles of construction it surely must mean that damage described in the words which immediately precede, and in respect of which alone compensation is to be made. "Damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default." Those words are introduced as the foundation of the inquiry into the fact of damage, the fact of such damage as gives a right to compensation. That matter of fact no doubt cannot be ascertained without dealing with the actual state of facts, whatever it may be found to be; and that actual state of facts may possibly raise questions of law as to what is or what is not done properly "in the exercise of any of the powers of the Act," and also as to what is and what is not a default on the part of the claimant. But the inquiry does not cease to be an inquiry into the facts though the facts may raise questions of law. If the arbitrator goes into the inquiry, as he ought, as a question of fact, and if he deals with the facts as he finds them, but deals with them in a wrong view of those facts according to law, then no doubt his award will not be final. If an action is brought upon it and it appears that he has been mistaken in the view of the law which has governed his view of the facts, there will be a verdict for the defendants upon the award; but if he has not miscarried, the award certainly cannot be worse for his stating upon the face of it that he finds that state of facts into which by the express terms of the law he is bound to inquire and which alone could give any right to compensation.

If, therefore, the case were entirely free from all authority, I should say that under the terms of this clause in this Act it was plain, that, without paralysing altogether the whole provisions of the legislature for the compensation of a person who had suffered damage the course of proceeding must be by arbitration and then by bringing an action upon the award. That is the proper course; and what the learned judge has found (and as far as I can understand he had reasonable ground for finding it) is, that as a matter of fact, and as a matter of law also, the damage was sustained "by reason of the exercise of the powers of the Act." Well, I really do not know that under those circumstances your Lordships need go at much length into the examination of the authorities, some of which may probably have been determined at a time when the general law under the Lands Clauses Act was not so well settled as it is now. If we look at the series of cases beginning with the *East and West India Dock Company* v. *Gattke* (1) before Lord Truro, which practically, though not in so many words, overruled the case of *London and North Western Railway Company* v. *Smith* (2) before Lord Cottenham,—if we begin with that case and follow the subsequent series of authorities, we find it perfectly settled, that when an arbitration is insisted upon under the Lands Clauses Act, the company has no right to say that the arbitrator cannot go into the questions of which he is the proper judge because the company, plausibly or not, denies the right; and, on the other hand, that the company will not be prejudiced if it has good legal ground for denying all liability, because the award will not be conclusive—an action may be brought upon it, and if it turns out that the law is in favour of the company, the company will have the benefit of it. That is perfectly settled under the Lands Clauses Act, and no question of this kind can be raised about it.

The cases which have been mentioned, *Reg.* v. *Metropolitan Commissioners of Sewers* (3), and *Reg.* v. *Burslem Local Board* (4), were not upon an Act containing this clause, or shewing so unequivocally as this does that something more than the mere question of the amount of compensation is to be determined. I rather prefer not expressing any opinion which I may have formed upon those cases—there is a good deal of difficulty, but I do not want unnecessarily to enter into a criticism of judgments upon a different Act of Parliament. They are undoubtedly decisions of judges of very high authority; but I am bound to say as much as this, that as I read those judgments and what passed in the case of *Bradley* v. *Southampton Local Board* (5), they seem to say that the mere denial of liability by the company is enough to suspend the right to proceed by way of arbitration. That (unless it turns upon differences in the particular terms of the different statutes) is inconsistent with what has since been determined in the case of *Burgess* v. *Northwich Local Board* (1), the whole proceeding in that case shewing that, even where there was matter to be inquired into (as in that case there was), matter of law affecting the right and the liability, the Court made that inquiry in an action brought upon the award, and did not find the award bad merely because that inquiry was one which it was necessary and proper to make. In that case it is perfectly clear that the award would have been sustained, if the state of facts had been found to be such as Bowen L.J. found them to be in the present case.

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(1) 3 Mac. & G. 155.

(2) 1 Mac. & G. 216.

(3) 1 E. & B. 694.

(4) 1 E. & E. 1077.

(5) 4 E. & B. 1014.

Now, that really is all which I feel it necessary to say. The conclusion to which I come is that the Court of Appeal has been entirely right, and that the appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON :—

My Lords, I am of the same opinion. Comparing the 308th section of the Public Health Act 1875 with the 68th section of the Lands Clauses Act 1845 I see no reason whatever for coming to the conclusion that a claimant under the one clause can be entitled to a remedy which is denied to a claimant under the other. The practice under the Act of 1845 has been authoritatively settled. I do not think that the same thing can be said of the practice following upon the Act of 1875. There are some decisions as to the procedure under the clauses of its predecessor, the Public Health Act of 1848; but, even in regard to the construction of these, there is no conclusive series of authorities.

I agree with the Lord Chancellor in thinking that the judgment under appeal ought to be affirmed with costs.

LORD FITZGERALD :—

My Lords, the only difficulty which I have felt is in differing from the considered judgment of Bowen L.J. I am, however, of opinion that the decision of the Court of Appeal was correct on the interpretation of the statute, and that even if the argument ab inconvenienti is applicable the balance of convenience preponderates in favour of that decision.

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(1) 37 L. T. (N.S.) 355; 6 Q. B. D. 264.

It would certainly not be desirable or for the public interests that the received interpretation of the 68th section of the Lands Clauses Act, and the long settled practice thereunder, should be departed from in the construction of the 308th section of the Public Health Act 1875. The two statutes are general enactments, each affecting the whole kingdom, and ought as to their arbitration clauses to receive the same interpretation unless the differing language of the enactments forbids it. In my opinion there is no such difference of language or of subject as requires a different interpretation to be put on sect. 308 of the Public Health Act, from that which has been established as the meaning of sect. 68 of the Lands Clauses Act.

Looking at the case as wholly governed by sect. 308 of the Public Health Act, it seems to me to be clear that it was open to the respondent (the plaintiff) to pursue the course of having the fact of damage and the amount of compensation settled in the first instance by arbitration. In establishing his case under that section the plaintiff had to sustain four propositions, viz., first, that he had sustained damage; secondly, that such damage had been occasioned by reason of the exercise by the local authority of the powers of the Act; thirdly, that such damage arose in relation to some matter as to which he was not himself in default; and fourthly, the amount of compensation to which he was properly entitled. Any dispute as to propositions 1 and 4 is to be settled by arbitration. The fact of damage comes first in the section and is the foundation of all the rest.

In the execution of his duties it is difficult to see how the arbitrator can avoid inquiring whether the acts complained of were matters done in the exercise of the powers of the Act, and as to which the claimant was not himself in default, so as to limit the scope of his assessment of compensation; but his decision, if any, as to the liability of the defendants in point of law would not be binding and would be inoperative. If the damage complained of has been occasioned apparently by reason of the exercise of the powers of the Act, the arbitrator proceeds to assess the amount of compensation limited to such damage, and leaving it open to the defendants, if they think fit, to contest their liability to the amount awarded on any grounds that may be open to them.

The course pursued here seems to me to be a convenient one, the statute does not forbid it, nor is there anything to be found in its language which indicates that it should not be open to the party who alleges that he is injured to elect to have the compensation which he claims assessed in the first instance in the manner prescribed by the statute.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 17th March 1884.

Solicitors for appellants: *Byrne & Lucas for Homfray & Holberton, Brierley Hill.*

Solicitors for respondent: *Mackeson, Taylor & Arnould, for Joseph Higgs, Brierley Hill.*

[HOUSE OF LORDS.]

JOHN WESTON FOAKES . . . . . APPELLANT; H. L. (E.)

AND 1884

JULIA BEER . . . . RESPONDENT. *May* 16.

Accord and Satisfaction — Debtor and Creditor — Contract—Consideration— Contract by Creditor to take less than Sum due.

An agreement between judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs and on condition of his paying to the creditor or his nominee the residue by instalments the creditor will not take any proceedings on the judgment, is nudum pactum, being without consideration, and does not prevent the creditor after payment of the whole debt and costs from proceeding to enforce payment of the interest upon the judgment.

So *Held* affirming the decision of the Court of Appeal.

Pinnel's Case (5 Rep. 117 a) and *Cumber* v. *Wane* (1 Str. 426) followed.

APPEAL from an order of the Court of Appeal (1).

On the 11th of August 1875 the respondent recovered judgment against the appellant for £2077 17*s.* 2*d.* for debt and £13 1*s.* 10*d.* for costs. On the 21st of December 1876 a memorandum of agreement was made and signed by the appellant and respondent in the following terms:—

"Whereas the said John Weston Foakes is indebted to the said Julia Beer, and she has obtained a judgment in Her Majesty's High Court of Justice, Exchequer Division, for the sum of £2090 19*s.* And whereas the said John Weston Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions. Now this agreement witnesseth that in consideration of the said John Weston Foakes paying to the said Julia Beer on the signing of this agreement the sum of £500, the receipt whereof she doth hereby acknowledge in part satisfaction of the said judgment debt of £2090 19*s.*, and on condition of his paying to her or her executors, administrators, assigns or nominee the sum of £150 on the 1st day of July and the 1st day of January or within one calendar month after each of the said days respectively in every year until the whole of the said sum of £2090 19*s*. shall have been fully paid and satisfied, the first of such payments to be made on the 1st day of July next, then she the said Julia Beer hereby undertakes and agrees that she, her executors, administrators or assigns, will not take any proceedings whatever on the said judgment."

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(1) 11 Q. B. D. 221.

The respondent having in June 1882 taken out a summons for leave to proceed on the judgment, an issue was directed to be tried between the respondent as plaintiff and the appellant as defendant whether any and what amount was on the 1st of July 1882 due upon the judgment.

At the trial of the issue before Cave J. it was proved that the whole sum of £2090 19*s*. had been paid by instalments, but the respondent claimed interest. The jury under his Lordship's direction found that the appellant had paid all the sums which by the agreement of the 21st of December 1876 he undertook to pay and within the times therein specified. Cave J. was of opinion that whether the judgment was satisfied or not, the respondent was, by reason of the agreement, not entitled to issue execution for any sum on the judgment.

The Queen's Bench Division (Watkin Williams and Mathew JJ.) discharged an order for a new trial on the ground of misdirection.

The Court of Appeal (Brett M.R., Lindley and Fry L.JJ.) reversed that decision and entered judgment for the respondent for the interest due, with costs (1).

March 31, April 1. *W. H. Holl* Q.C. for the appellant:—

Apart from the doctrine of *Cumber* v. *Wane* (2) there is no reason in sense or law why the agreement should not be valid, and the creditor prevented from enforcing his judgment if the agreement be performed. It may often be much more advantageous to the creditor to obtain immediate payment of part of his debt than to wait to enforce payment, or perhaps by pressing his debtor to force him into bankruptcy with the result of only a small dividend. Moveover if a composition is accepted friends,

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(1) 11 Q. B. D. 221.

(2) 1 Str. 426.

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who would not otherwise do so, may be willing to come forward to assist the debtor. And if the creditor thinks that the acceptance of part is for his benefit who is to say it is not? The doctrine of *Cumber* v. *Wane* (1) has been continually assailed, as in *Couldery* v. *Bartrum* (2) by Jessel M.R. In the note to *Cumber* v. *Wane* (1) (1 Smith L. C. 4th ed. p. 253, 8th ed. p. 367) which was written by J. W. Smith and never disapproved by any of the editors, including Willes and Keating JJ., it is said "that its doctrine is founded upon vicious reasoning and false views of the office of a Court of law, which should rather strive to give effect to the engagements which persons have thought proper to enter into, than cast about for subtle reasons to defeat them upon the ground of being unreasonable. Carried to its full extent the doctrine of *Cumber* v. *Wane* (1) embraces the exploded notion that in order to render valid a contract not under seal, the adequacy as well as the existence of the consideration must be established. Accordingly in modern times it has been, as appears by the preceding part of the note, subjected to modification in several instances." *Cumber* v. *Wane* (1) was decided on a ground now admitted to be erroneous, viz. that the satisfaction must be found by the Court to be reasonable. The Court cannot inquire into the adequacy of the consideration. *Reynolds* v. *Pinhowe* (3), which was not cited in *Cumber* v. *Wane* (1) nor in *Fitch* v. *Sutton* (4), decided that the saving of trouble was a sufficient consideration; "for it is a benefit unto him to have his debt without suit or charge." This decision was cited with approval by Littledale J. in *Wilkinson* v. *Byers* (5). *Pinnel's Case* (6) was decided on a point of pleading: the dictum that payment of a smaller sum was no satisfaction of a larger, was extra-judicial, and overlooked all considerations of mercantile convenience, such as mentioned in *Reynolds* v. *Pinhowe* (3); and it is also noticeable that it was a case of a bond debt sought to be set aside by a parol agreement. It is every day practice for tradesmen to take less in satisfaction of a larger sum, and give discount, where there is neither custom nor right to take credit. The reasoning in

(1) 1 Str. 426.
(2) 19 Ch. D. 394, 399.
(3) Cro. Eliz. 429.
(4) 5 East, 230.
(5) 1 A. & E. 111.
(6) 5 Rep. 117 a.

Heathcote v. *Crookshanks* (1) and *Thomas* v. *Heathorn* (2) is inconsistent with later decisions: see *Sibree* v. *Tripp* (3), where a promissory note for a smaller sum was held a satisfaction of the debt, and *Curlewis* v. *Clark* (4), a similar decision as to a bill. *Fitch* v. *Sutton* (5) will be cited contrà, but is clearly wrong. The agreement to pay the respondent's nominee is good consideration. A cheque is sufficient consideration: *Goddard* v. *O'Brien* (6). It has often been held that a sheet of paper or a stick of sealing wax is a sufficient consideration. The result of the cases is that if *Cumber* v. *Wane* (7) be right, payment of a less sum than the debt due, by a bill, promissory note or cheque is a good discharge; but payment of such less sum by sovereigns or Bank of England notes is not. Here the agreement is not to take less than the debt, but to give time for payment of the whole without interest. Mankind have never acted on the doctrine of *Cumber* v. *Wane* (7), but the contrary; nay few are aware of it. By overruling it the House will only declare the universal practice to be good law as well as good sense.

[EARL OF SELBORNE, L.C.:—Whatever may be the ultimate decision of this appeal the House is much indebted to Mr. Holl for his exceedingly able argument.]

Winch followed on the same side, and contended that on the true construction of the agreement no provision was made for interest.

Bompas Q.C. (*Gaskell* with him) for the respondent:—

The agreement was not intended to and does not deprive the respondent of her right to interest. But if it does it is void for want of consideration. There is a strong current of authority that what the law implies as a duty is no consideration. Therefore where a debt is due part payment is no reason for giving up the residue. The doctrine is too well settled to be now overthrown: see a long list of authorities, among which it is enough

(1) 2 T. R. 24.
(2) 2 B. & C. 477.
(3) 15 M. & W. 23, 37.
(4) 3 Ex. 375.
(5) 5 East, 230.
(6) 9 Q. B. D. 37.
(7) 1 Str. 426.

to refer to *Dixon* v. *Adams* (1); *Richards* v. *Bartlet* (2); *Goring* v. *Goring* (3); *Geang* v. *Swaine* (4); *McManus* v. *Bark* (5); *Fitch* v. *Sutton* (6); *Adams* v. *Tapling* (7); *Down* v. *Hatcher* (8); *Evans* v. *Powis* (9). In the cases in which *Cumber* v. *Wane* (10) has been departed from the Judges admit its principle, but distinguish the facts. *Goddard* v. *O'Brien* (11) was wrongly decided. It is contrary to public policy to make the performance of a legal duty a good consideration; see the cases on seamen's wages: *Stilk* v. *Myrick* (12); *Harris* v. *Watson* (13); *Newman* v. *Walters* (14); *Clutterbuck* v. *Coffin* (15); *Harris* v. *Carter* (16). Where law and practice are so well established this House will not now depart from them: see the observations in *Danford* v. *McAnulty* (17). The Court went even further than *Cumber* v. *Wane* (10) in *Lovelace* v. *Cockct* (18), where to an action on a bond for the payment of money at a certain day, a plea that the plaintiff at the day of payment accepted another bond for the payment of the money in satisfaction, was on demurrer "held to be a naughty plea, for one bond cannot overthrow another." And so in *Hawes* v. *Birch* (19) it was held that "one thing in action cannot be satisfaction for another thing in action."

Holl Q.C. in reply:—

The cases about seamen's wages have always been based on questions of public policy: see *Harris* v. *Watson* (20). *Dixon* v. *Adams* (1) was commented upon by Littledale J. in *Wilkinson* v. *Byers* (21). *Richards* v. *Bartlet* (2) and *Geang* v. *Swaine* (22) were decided on the ground that a plea of accord without satisfaction is no bar. In *Down* v. *Hatcher* (8) no reasons for the decision

(1) Cro. El. 538.
(2) 1 Leon. 19.
(3) Yelv. 10.
(4) 1 Lutw. C. P. 464, 466.
(5) Law Rep. 5 Ex. 65.
(6) 5 East, 230.
(7) 4 Mod. 88.
(8) 10 A. & E. 121.
(9) 1 Ex. 601.
(10) 1 Str. 426.
(11) 9 Q. B. D. 37.
(12) 2 Camp. 317.
(13) 1 Peake, 102.
(14) 3 B. & P. 612.
(15) 4 Scott, N. R. 509.
(16) 3 E. & B. 559.
(17) 8 App. Cas. 463.
(18) 1 Br. & Gold. 47.
(19) 1 Br. & Gold. 71.
(20) 1 Peake, 102.
(21) 1 A. & E. 111.
(22) 1 Lutw. C. P. 464.

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were given, and it was doubted by Parke B. in *Cooper* v. *Parker* (1).

The House took time for consideration.

May 16. EARL OF SELBORNE L.C.:—

My Lords, upon the construction of the agreement of the 21st of December 1876, I cannot differ from the conclusion in which both the Courts below were agreed. If the operative part could properly be controlled by the recitals, I think there would be much reason to say that the only thing contemplated by the recitals was giving time for payment, without any relinquishment, on the part of the judgment creditor, of any portion of the amount recoverable (whether for principal or for interest) under the judgment. But the agreement of the judgment creditor, which follows the recitals, is that she "will not take any proceedings whatever on the judgment," if a certain condition is fulfilled. What is that condition? Payment of the sum of £150 in every half year, "until the whole of the said sum of £2090 19*s*." (the aggregate amount of the principal debt and costs, for which judgment had been entered) "shall have been fully paid and satisfied." A particular "sum" is here mentioned, which does not include the interest then due, or future interest. Whatever was meant to be payable at all, under this agreement, was clearly to be payable by half-yearly instalments of £150 each; any other construction must necessarily make the conditional promise nugatory. But to say that the half-yearly payments were to continue till the whole sum of £2090 19*s*., "and interest thereon," should have been fully paid and satisfied, would be to introduce very important words into the agreement, which are not there, and of which I cannot say that they are necessarily implied. Although, therefore, I may (as indeed I do) very much doubt whether the effect of the agreement, as a conditional waiver of the interest to which she was by law entitled under the judgment, was really present to the mind of the judgment creditor, still I cannot deny that it might have that effect, if capable of being legally enforced.

(1) 15 C. B. 822, 828.

But the question remains, whether the agreement is capable of being legally enforced. Not being under seal, it cannot be legally enforced against the respondent, unless she received consideration for it from the appellant, or unless, though without consideration, it operates by way of accord and satisfaction, so as to extinguish the claim for interest. What is the consideration? On the face of the agreement none is expressed, except a present payment of £500, on account and in part of the larger debt then due and payable by law under the judgment. The appellant did not contract to pay the future instalments of £150 each, at the times therein mentioned; much less did he give any new security, in the shape of negotiable paper, or in any other form. The promise de futuro was only that of the respondent, that if the half-yearly payments of £150 each were regularly paid, she would "take no proceedings whatever on the judgment." No doubt if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obligation; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs, could not (in my opinion) be a consideration for the relinquishment of interest and discharge of the judgment, unless the payment of the £500, at the time of signing the agreement, was such a consideration. As to accord and satisfaction, in point of fact there could be no complete satisfaction, so long as any future instalment remained payable; and I do not see how any mere payments on account could operate in law as a satisfaction ad interim, conditionally upon other payments being afterwards duly made, unless there was a consideration sufficient to support the agreement while still unexecuted. Nor was anything, in fact, done by the respondent in this case, on the receipt of the last payment, which could be tantamount to an acquittance, if the agreement did not previously bind her.

The question, therefore, is nakedly raised by this appeal, whether your Lordships are now prepared, not only to overrule, as contrary to law, the doctrine stated by Sir Edward Coke to have been laid down by all the judges of the Common Pleas in *Pinnel's Case* (1) in 1602, and repeated in his note to Littleton, sect. 344 (2), but to treat a prospective agreement, not under seal, for satisfaction of a debt, by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made; the case not being one of a composition with a common debtor, agreed to, inter se, by several creditors. I prefer so to state the question instead of treating it (as it was put at the Bar) as depending on the authority of the case of *Cumber* v. *Wane* (3), decided in 1718. It may well be that distinctions, which in later cases have been held sufficient to exclude the application of that doctrine, existed and were improperly disregarded in *Cumber* v. *Wane* (3); and yet that the doctrine itself may be law, rightly recognised in *Cumber* v. *Wane* (3), and not really contradicted by any later authorities. And this appears to me to be the true state of the case. The doctrine itself, as laid down by Sir Edward Coke, may have been criticised, as questionable in principle, by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your Lordships would do right, if you were now to reverse, as erroneous, a judgment of the Court of Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for 280 years.

The doctrine, as stated in *Pinnel's Case* (1), is "that payment of a lesser sum on the day" (it would of course be the same after the day), "in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." As stated in Coke Littleton, 212 (b), it is, "where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater;" adding (what is beyond controversy), that an acquittance under seal, in full satisfaction of the whole, would (under like circumstances) be valid and binding.

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(1) 5 Rep. 117 a.

(2) Co. Litt. 212 b.

(3) 1 Sm. L. C. 8th ed. 357.

The distinction between the effect of a deed under seal, and that of an agreement by parol, or by writing not under seal, may seem arbitrary, but it is established in our law; nor is it really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation. If the question be (as, in the actual state of the law, I think it is), whether consideration is, or is not, given in a case of this kind, by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law. It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be, generally, binding, though not under seal; nor should I be unwilling to see equal force given to a prospective agreement, like the present, in writing though not under seal; but I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. All the authorities subsequent to *Cumber* v. *Wane* (1), which were relied upon by the appellant at your Lordships' Bar (such as *Sibree* v. *Tripp* (2), *Curlewis* v. *Clark* (3), and *Goddard* v. *O'Brien* (4)) have proceeded upon the distinction, that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability. I think it unnecessary to go through those cases, or to examine the particular grounds on which each of them was decided. There are no such facts in the case now before your Lordships. What is called "any benefit, or even any legal possibility of benefit," in Mr. Smith's notes to *Cumber* v. *Wane* (1), is not

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(1) 1 Sm. L. C. 8th ed. 366.
(2) 15 M. & W. 23.
(3) 3 Ex. 375.
(4) 9 Q. B. D. 37.

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(as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal.

My conclusion is, that the order appealed from should be affirmed, and the appeal dismissed, with costs, and I so move your Lordships.

LORD BLACKBURN:—

My Lords, the first question raised is as to what was the true construction of the memorandum of agreement made on the 21st of December 1876. What was it that the parties by that writing agreed to?

The appellants contend that they meant that on payment down of £500, and payment within a month after the 1st day of July and the 1st day of January in each ensuing year of £150, until the sum of £2090 19*s.* was paid, the judgment for that sum and interest should be satisfied, for an agreement to take no proceedings on the judgment is equivalent to treating it as satisfied. This construction of the memorandum requires that after the tenth payment of £150 there should be a further payment of £90 19*s.* made within the next six months. This is the construction which all three Courts below have put upon the memorandum.

The respondent contends that the true construction of the memorandum was that time was to be given on those conditions for five years, the judgment being on default of any one payment enforceable for whatever was still unpaid, with interest from the date the judgment was signed, but that the interest was not intended to be forgiven at all.

If this is the true construction of the agreement the judgment appealed against is right and should be affirmed, whether the reason on which the Court of Appeal founded its judgment was right or not. I am, however, of opinion that the Courts below, who on this point were unanimous, put the true construction on the memorandum. I do not think the question free from difficulty.

It would have been easy to have expressed, in unmistakeable words, that on payment down of £500, and punctual payment at the rate of £300 a year till £2090 19*s.* was paid, the judgment should not be enforced either for principal or interest; or language might have been used which should equally clearly have expressed that, though time was to be given, interest was to be paid in addition to the instalments. The words actually used are such that I think it is quite possible that the two parties put a different construction on the words at the time; but I think the words "till the said sum of £2090 19*s.* shall have been fully paid and satisfied" cannot be construed as meaning "till that sum, with interest from the day judgment was signed, shall have been fully paid and satisfied," nor can the promise "not to take any proceedings whatever on the judgment" be cut down to meaning any proceedings except those necessary to enforce payment of interest.

I think, therefore, that it is necessary to consider the ground on which the Court of Appeal did base their judgment, and to say whether the agreement can be enforced. I construe it as accepting and taking £500 in satisfaction of the whole £2090 19*s.*, subject to the condition that unless the balance of the principal debt was paid by the instalments, the whole might be enforced with interest. If, instead of £500 in money, it had been a horse valued at £500, or a promissory note for £500, the authorities are that it would have been a good satisfaction, but it is said to be otherwise as it was money.

This is a question, I think, of difficulty.

In Coke, Littleton 212 b, Lord Coke says: "where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because *it is apparent* that a lesser sum of money *cannot* be a satisfaction of a greater . . . . If the obligor or feoffor pay a lesser sum either before the day or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." For this he cites *Pinnel's Case* (1). That was an action on a bond for £16, conditioned for the payment of £8 10*s.* on the 11th of November 1600. Plea that

(1) 5 Rep. 117 a.

defendant, at plaintiff's request, before the said day, to wit, on the 1st of October, paid to the plaintiff £5 2*s.* 2*d.*, which the plaintiff accepted in full satisfaction of the £8 10*s.* The plaintiff had judgment for the insufficient pleading. But though this was so, Lord Coke reports that it was resolved by the whole Court of Common Pleas "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum: but the gift of a horse, hawk, or robe, &c., in satisfaction is good, for it shall be intended that a horse, hawk, or robe, &c., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material; so if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction for the whole £10, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction."

There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the Court will not inquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in satisfaction when it was not a sufficient satisfaction it was his own fault. And that payment before the day might be more beneficial, and consequently that the plea was in substance good, and this must have been decided in the case.

There is a second point stated to have been resolved, viz.: "That payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." This was certainly not necessary for the decision of the case; but though the resolution of the Court of Common Pleas was only a dictum, it seems to me clear that Lord Coke deliberately adopted the dictum, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake, and though I cannot find that in any subsequent case this dictum has been made the ground of the decision, except in *Fitch* v. *Sutton* (1), as to which I shall make some remarks later, and in *Down* v. *Hatcher* (2), as to which Parke, B. in *Cooper* v. *Parker* (3), said, "Whenever the question may arise as to whether *Down* v. *Hatcher* (2) is good law, I should have a great deal to say against it," yet there certainly are cases in which great judges have treated the dictum in *Pinnel's Case* (4) as good law.

For instance, in *Sibree* v. *Tripp* (5), Parke, B. says, "It is clear if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder." And Alderson, B. in the same case says, "It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand which ought to be paid, is payment only in part, because it is not one bargain, but two; viz. payment of part, and an agreement without consideration to give up the residue. The Courts might very well have held the contrary, and have left the matter to the agreement of the parties, but undoubtedly the law is so settled." After such strong expressions of opinion, I doubt much whether any judge sitting in a Court of the first instance would be justified in treating the question as open. But as this has very seldom, if at all, been the ground of the decision even in a Court of the first instance, and certainly never been the ground of a decision in the Court of Exchequer Chamber, still less in this House, I did think it open in your Lordships' House to reconsider this question. And, notwithstanding the very high authority of Lord

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(1) 5 East, 230.
(2) 10 A. & E. 121.
(3) 15 C. B. 828.
(4) 5 Rep. 117 a.
(5) 15 M. & W. 33, 37.

Coke, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand, can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges.

I will first examine the authorities. If a defendant pleaded the general issue, the plaintiff could join issue at once, and if the case was not defended get his verdict at the next assizes. But by pleading a special plea, the plaintiff was obliged to reply, and the defendant often caused the plaintiff, merely by the delay occasioned by replying, to lose an assize. If the replication was one to which he could demur he made this sure. Strangely enough it seems long to have been thought that if the defendant kept within reasonable bounds neither he nor his lawyers were to blame in getting time in this way by a sham plea—that a chattel was given and accepted in satisfaction of the debt. The recognised forms were giving and accepting in satisfaction a beaver hat: *Young* v. *Rudd* (1), or a pipe of wine (2). All this is now antiquated. But whilst it continued to be the practice, the pleas founded on the first part of the resolution in *Pinnel's Case* (3) were very common, and that law was perfectly trite. No one for a moment supposed that a beaver hat was really given and accepted; but every one knew that the law was that if it was really given and accepted it was a good satisfaction. But special pleas founded on the other resolution in *Pinnel's Case* (3), on what I have ventured to call the dictum, were certainly not common. I doubt if a real defence of this sort was ever specially pleaded. When there really was a question as to whether a debt was satisfied by a payment of a smaller sum the defendant pleaded the general issue, and if it was proved to the satisfaction of the jury that a smaller sum had been paid and accepted in satisfaction of a greater, if objection was raised the jury might perhaps, as suggested by Holroyd J. in *Thomas* v. *Heathorn* (4), find that the circumstances were such that the legal effect was to be as if the whole was paid down and a portion thrown back as a god's-penny. This, however, seems to me to be an unsatisfactory and

(1) 5 Mod. 86.

(2) 3 Chit. Plead. 7th Ed. 92.

(3) 5 Rep. 117 a.

(4) 2 B. & C. 482.

artificial way of avoiding the effect of the dictum, and it could not be applied to such an agreement as that now before this House.

For whatever reason it was, I know of no case in which the question was raised whether a payment of a lesser sum could be satisfaction of a liquidated demand from *Pinnel's Case* (1) down to *Cumber* v. *Wane*, 5 Geo. 1 (2), a period of 115 years.

In *Adams* v. *Tapling* (3) where the plea was bad for many other reasons, it is reported to have been said by the Court that: "In covenant where the damages are uncertain, and to be recovered, as in this case, a lesser thing may be done in satisfaction, and there 'accord and satisfaction' is a good plea." No doubt this was one of the cases which Parke, B. would have cited in support of his opinion that *Down* v. *Hatcher* (4) was not good law. The Court are said to have gone on to recognise the dictum in *Pinnel's Case* (1), or at least not to dissent from it, but it was not the ground of their decision. In every other reported case which I have seen the question arose on a demurrer to a replication to what was obviously a sham or dilatory plea.

Some doubt has been made as to what the pleadings in *Cumber* v. *Wane* (5) really were. I have obtained the record (6). The plea is that after the promises aforesaid, and before the issuing of the writ, it was agreed between the said George and Edward Cumber that he, the said George, "daret eidem Edwardo Cumber quandm notam in script vocatam 'a promissory note' manu propria ipsius Georgii subscript pr. solucõn eidem Edwardo Cumber vel ordiñi quinque librarum," fourteen days after date, in full satisfaction and exoneration of the premises and promises, which said note in writing the said George then gave to the said Edward Cumber, and the said Edward Cumber then and there received from the said George the said note in full satisfaction and discharge of the premises and promises.

The replication is that, "the said George did not give to him Edward any note in writing called a promissory note with the hand of him George subscribed for the payment to him Edward or his order of £5, fourteen days after date in full satisfaction and discharge of the premises and promises." To this there is a demurrer and judgment in the Common Pleas for the plaintiff "that the replication was good in law."

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(1) 5 Rep. 117 a.

(2) 1 Sm. L. C. 8th Ed. 357.

(3) 4 Mod. 88.

(4) 10 A. & E. 121.

(5) 1 Str. 426.

(6) The reference is: Queen's Bench (Plea side) Plea Roll. 5 Geo. 1, Trinity, ro. 173.

The reporter, oddly enough, says there was an immaterial replication. The effect of the replication is to put in issue the substance of the defence, namely, the giving in satisfaction; *Young* v. *Rudd* (1), and certainly that was not immaterial. But for some reason, I do not stop to inquire what, Pratt C.J. prefers to base the judgment affirming that of the Common Pleas on the supposed badness of the plea rather than on the sufficiency of the replication. It is impossible to doubt that the note, which it is averred in the plea was given as satisfaction, was a negotiable note. And therefore this case is in direct conflict with *Sibree* v. *Tripp* (2).

Two cases require to be carefully considered. The first is *Heathcote* v. *Crookshanks* (3). The plea there pleaded would, I think, now be held perfectly good, see *Norman* v. *Thompson* (4); but Buller J. seems to have thought otherwise. He says, "thirdly it was said that all the creditors were bound by this agreement to forbear, but that is not stated by the plea. It is only alleged that they agreed to take a certain proportion, but that is a nudum pactum, unless they had afterwards accepted it. In the case in which *Cumber* v. *Wane* (5) was denied to be law, *Hardcastle* v. *Howard* (26 Geo. 3, B.R.), the party actually accepted. But as the plaintiff in the present case refused to take less than the whole demand, the plea is clearly bad."

That decision goes entirely on the ground that accord without satisfaction is not a plea. I do not think it can be fairly said that Buller J. meant by saying "that is a nudum pactum, unless they had afterwards accepted it," to express an opinion that if the dividend had been accepted it would have been a good satisfaction. But he certainly expresses no opinion the other way.

In *Fitch* v. *Sutton* (6) not only did the plaintiff not accept

(1) 5 Mod. 86.

(2) 15 M. & W. 23.

(3) 2 T. R. 24.

(4) 4 Ex. 755.

(5) 1 Str. 426.

(6) 5 East, 230.

the payment of the dividend in satisfaction, but refused to accept it at all, unless the defendant promised to pay him the balance when of ability, and the defendant assented and made the promise required, so that but for the fact that other creditors were parties to the composition there could have been no defence. There was no point of pleading in that case, the whole being open under the general issue. And in *Steinman* v. *Magnus* (1) it was pretty well admitted by Lord Ellenborough that the decision in *Fitch* v. *Sutton* (2) would have been the other way, if they had understood the evidence as the reporter did. But though this misapprehension of the judges as to the facts, and the absence of any acceptance of the dividend, greatly weaken the weight of *Fitch* v. *Sutton* (2), still it remains that Lord Ellenborough, a very great judge indeed, did, however hasty or unnecessary it may have been to express such an opinion, say, "It is impossible to contend that acceptance of £17 10*s*. is an extinguishment of a debt of £50. There must be some consideration for the relinquishment of the residue; something collateral, to shew a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is nudum pactum. But the mere promise to pay the rest when of ability put the plaintiff in no better condition than he was before. It was expressly determined in *Cumber* v. *Wane* (3) that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me in argument in *Heathcote* v. *Crookshanks* (4) to have been denied to be law, and in confirmation of that Buller J. afterwards referred to a case (stated to be that of *Hardcastle* v. *Howard* (H. 26 Geo. 3)), yet I cannot find any case of that sort, and none has been now referred to; on the contrary the decision in *Cumber* v. *Wane* (3) is directly supported by the authority of *Pinnel's Case* (5), which never appears to have been questioned."

I must observe that, whether *Cumber* v. *Wane* (3) was, or was not denied to be law in *Hardcastle* v. *Howard*, it certainly was denied to be law in *Sibree* v. *Tripp* (6), and that, though it is quite true that *Pinnel's Case* (1), as far as regards the points actually raised in the case, has not only never been questioned, but is often assented to, I am not aware that in any case before *Fitch* v. *Sutton* (2), unless it be *Cumber* v. *Wane* (3), has that part of it which I venture to call the dictum ever been acted upon; and as I have pointed out, had it not been for the composition with other creditors, there could have been no defence in *Fitch* v. *Sutton* (2), whether the dictum in *Pinnel's Case* (1) was right or wrong.

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(1) 11 East, 390.
(2) 5 East, 230.
(3) 1 Str. 426.
(4) 2 T. R. 24.
(5) 5 Rep. 117 a.
(6) 15 M. & W. 23.

Still this is an authority, and I have no doubt that it was on the ground of this authority and the adhesion of Bayley J. to it in *Thomas* v. *Heathorn* (4), that Barons Parke and Alderson expressed themselves as they did in the passages I have cited from *Sibree* v. *Tripp* (5). And I think that their expressions justify Mr. John William Smith in laying it down as he does in his note to *Cumber* v. *Wane* (3), in the second edition of his "Leading Cases," that "a liquidated and undisputed money demand, of which the day of payment is passed (not founded upon a bill of exchange or promissory note), cannot even with the consent of the creditor be discharged by mere payment by the debtor of a smaller amount in money in the same manner as he was bound to pay the whole." I am inclined to think that this was settled in a Court of the first instance. I think however that it was originally a mistake.

What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them.

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(1) 5 Rep. 117 a.
(2) 5 East, 230.
(3) 1 Str. 426.
(4) 2 B. & C. 477.
(5) 15 M. & W. 23.

I assent to the judgment proposed, though it is not that which I had originally thought proper.

LORD WATSON:—

My Lords, I am of opinion that the judgment of the Court of Appeal ought to be affirmed.

I regret that I have been unable to adopt that construction of the memorandum of agreement which has commended itself to your Lordships who have already spoken as well as to the judges of the Court of Appeal. It appears to me that the respondent did not intend to pass, and did not pass, from her legal claim for interest on the judgment debt due to her by the appellant. She undertakes not to take proceedings on the judgment provided the stipulated termly instalments are regularly paid, "until the whole of the said sum of £2090 19*s.* shall have been fully paid and satisfied." But these words, the "said sum," ought, in my opinion, to be construed as referring to the sum of £2090 19*s.* previously described as being contained in a judgment of Her Majesty's High Court of Justice, and therefore bearing interest ex lege. The whole context of the memorandum appears to me to be consistent with this view, and to point strongly to the inference that there was no agreement, or even proposal, that the respondent should make any abatement of her legal claims, or do more than give her debtor time on the conditions expressed, "to pay such judgment."

I must assume, however, that I have wrongly construed the memorandum of agreement, and that its language imports that the respondent was to abstain from taking proceedings upon the judgment, if and when instalments to the amount of £2090 19*s.* had been duly and regularly paid. Upon that assumption, I am still of opinion that the respondent ought to prevail, on the simple ground that, in that view of the memorandum her agreement to abate part of her claim was nudum pactum, for which the appellant gave no legal consideration.

I do not think it necessary to consider whether it would still be open to this House, if so advised, to overrule the doctrine of *Cumber* v. *Wane* (1) and *Pinnel's Case* (2), because I am not prepared to disturb that doctrine. Nor do I think it necessary to occupy the time of the House with a detailed explanation of the considerations which have led me to that result, seeing that I concur in the judgment of the Lord Chancellor, and also in the opinion about to be delivered by my noble and learned friend opposite (Lord FitzGerald), which I have had the advantage of reading.

LORD FITZGERALD:—

My Lords, the first question is as to the true construction of the memorandum of agreement of the 21st of December 1876, and I express my opinion on it with the greatest diffidence. My excuse for expressing any opinion upon it is that I feel rather strongly on the point. The memorandum is, it may be observed, unilateral, for Dr. Foakes by it assumes no obligation.

The first recital is that Mrs. Beer had obtained a judgment against Dr. Foakes for a sum of £2090 19*s*. The judgment would not per se, at common law, entitle the plaintiff to interest, but the statute 1 & 2 Vict. c. 110 s. 17 provides "that every judgment debt shall carry interest at 4 per cent. from the time of entering up until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." This right to interest is different from interest arising on contract, or which a jury may give as damages or may withhold. It is a clear statutory right, arising immediately on entering up the judgment, and continuing until the judgment debt is fully paid. The position of the parties at the date of the agreement then was that Dr. Foakes owed Mrs. Beer the principal sum of £2090 19*s*., recovered by a judgment which carried interest at 4 per cent., arising de die in diem as a statutory right, and then (that is, at the time of the agreement) amounting to £113 16*s*. 2*d*.

The agreement then contains this recital: "And whereas the said J. W. Foakes has requested the said Julia Beer to give him time in which to pay *such judgment*, which she has agreed to do on the following conditions." He does not ask for any remission of any portion of his obligation, he solicits only time for payment, and she agrees to give him that time and no more.

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(1) 1 Sm. L. C. 8th Ed. 357.

(2) 5 Rep. 117 a.

It seems to me clear and free from doubt that "such judgment" in this recital would, if there was no more to guide us, mean the judgment debt with its statutable interest at 4 per cent. The language of the recital and of the whole agreement seems to be that of Mr. Smith, the defendant's solicitor, as we find in Mackreth's evidence this statement: "The agreement was prepared by Smith and sent to me, and I approved of it on behalf of Mrs. Beer."

Returning to the language of the agreement, it is remarkable that Dr. Foakes undertakes by it no obligation whatever; he does not bind himself to pay any instalment to her or to her "nominee;" and it was not necessary that he should, for I can entertain no doubt that if what is called the "condition" for payment of the instalments had not been fulfilled, then Mrs. Beer could have enforced the whole residue of her demand for principal and the interest that accrued, by execution on the judgment. Dr. Foakes enters into no obligation to pay to her "nominee," and this seems to displace in fact the foundation of the judgment of the Divisional Court, where Williams J. is reported to have said (1): "The doctrine is that an agreement to pay a less sum in satisfaction of a debt is without consideration. The English law forbids such an agreement. That is the law in its naked simplicity. But I think a very little departure from the mere agreement to pay a less sum will make the agreement good. If the creditor says, 'You owe me a large sum of money —I am willing to accede to your request for time, but you must enter into an agreement in writing, at your expense (as it would be) and you shall pay the money to me or to any person I may name at my election,' that, I think, is enough to make this agreement not a nudum pactum." (There is no such thing in the agreement here.) And Mathew J. adds, "It is noticeable that the agreement is framed so that it casts an obligation which would not otherwise have existed. The agreement to pay the creditor's nominee renders it a document available as a security." It would seem, to me at least, that the terms of the agreement had never been properly conveyed to the minds of the judges; for in fact Dr. Foakes assumed no greater obligation than the law imposed on him in respect of the judgment.

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(1) These quotations are from the printed papers before the House.

The expressed consideration is the payment to Mrs. Beer "of the sum of £500 in part satisfaction of *the said judgment debt of* £2090 19*s*.," and again I should repeat here that the last words would mean the debt and the right to interest which it carried, if there is nothing subsequent to impose a different meaning. The term "satisfaction" is specially applicable to a judgment. You could not in former times plead payment simply to a scire facias on a judgment. The plea should shew satisfaction. The judgment would not be satisfied on payment of the £2090 19*s*. but only by payment of that sum and the interest. The agreement then provides as a condition for the payment of the instalments of £150, "until the whole of the said *sum* of £2090 19*s*. shall have been fully paid and *satisfied*." The whole difficulty arises on this passage. If in place of using the word "sum" it had used "judgment" or "judgment debt," in my opinion there could have been but one construction, viz., that "judgment" or "judgment debt" meant the principal sum of £2090 19*s*. with "interest at 4 per cent." Now, having regard to what the parties were at, why should we not read "the said sum of £2090 19*s*." by the light of the antecedent parts of the same agreement as meaning "the said judgment for £2090 19*s*.," and thus do full and complete justice, and not deprive Mrs. Beer of about £350 as justly due to her as the £2090 19*s*., and which, it is to me manifest, she never intended and was never asked to relinquish? There is a special recital indicating what the parties intended, viz., "time on certain conditions" but without a word as to relinquishing any part of the plaintiff's demand, and if the subsequent words are more general, we should limit and qualify them by the special language of the recital.

Dr. Foakes did not ask for any remission, he asked for time and for time alone, and we ought to assume that when his solicitor prepared and furnished the memorandum of agreement he did not intend by its language that any part of Mrs. Beer's demand was to be released. Mackreth says that in the course of the negociation "interest was never mentioned at all in reference to that agreement." She adopted the language of the memorandum, and it became hers, but was it such as to lead Dr. Foakes to understand that Mrs. Beer agreed on performance of the condition to give up her claim to interest? I think that we ought not to adopt such a conclusion.

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There are many authorities for the proposition that you may limit the general words of release by the antecedent recitals, so as to effectuate that alone which was within the intention of the parties. I might refer to a number of cases, for example *Thorpe* v. *Thorpe* (1), where it is said *per Cur:* "Where there are general words only in a release they shall be taken most strongly against the releasor, but where there is a particular recital and general words follow, there the general words shall be qualified by the special words."

Applying that rule to the present case, you may limit the general words at the conclusion of the memorandum to the giving of time alone, that is to say, if "judgment debt of £2090 19*s*." means the sum of £2090 19*s*. and nothing more, then that Mrs. Beer agrees to give time for payment of the principal debt of £2090 19*s*. by the instalments and at the times indicated, and that pending that arrangement she would not "take any proceedings whatever on the said judgment." This would give effect to every word and leave the "interest" untouched, which, if the principal is to be paid by instalments, could not well be ascertained until the time had been reached for the payment of the last instalment. There is nothing in the memorandum, it should be observed, to prevent Dr. Foakes from coming in at any time and discharging the whole principal before the instalments became payable. Upon the construction of the memorandum I am of opinion that the decision of the Court of Appeal should be affirmed.

The second question now presents itself, but with my view on the first it is not actually necessary for me to express any opinion on it, but it seems more satisfactory that I should do so. Assuming that I have fallen into error in interpreting the agreement, and that it is to be read that if Dr. Foakes should pay the actual sum of £2090 19*s*. by instalments according to the condition she would relinquish her statutable debt for interest and not issue execution on the judgment to recover it, is such an agreement nudum pactum, and therefore incapable of being enforced?

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(1) 1 Ld. Raym. 235.

I have listened with much interest, and I may add, with no small instruction, to the judgment of my noble and learned friend Lord Blackburn. He has as usual gone to the very foundation, and I regret that I have been unable to assist him in overturning the resolution of the Court of Common Pleas as reported by Lord Coke in *Pinnel's Case* (1), or in expunging from the books the infinitesimal remains of *Cumber* v. *Wane* (2). It seems to me doubtful whether the question arises which my noble and learned friend has presented, viz.: whether payment of a part of a debt ascertained by judgment can be a satisfaction of the whole? In the case before us the whole of the £2090 19*s*., the principal of the judgment, has been paid to the last farthing.

The interpretation put by the judges of the Courts below, and adopted by the Lord Chancellor, and my noble and learned friend Lord Blackburn, on the memorandum, seems to me to divide it in effect into two stipulations, the first being that if Dr. Foakes, should pay down £500, and the remainder of the actual sum of £2090 19*s*. in the manner prescribed, Mrs. Beer would so accept it, and pending the payments, would take no proceeding on the judgment; and the second being that if the £2090 19*s*. should be paid in the manner indicated, she would relinquish her claim for interest, and would not take any proceedings whatever on the judgment to enforce that interest. The question is whether there is any sufficient legal consideration for the relinquishment of the debt for interest. I am clearly of opinion that there is not.

My noble and learned friend Lord Blackburn has shewn us very clearly that the resolution in *Pinnel's Case* (1) was not necessary for the decision of that case, and that the principle on which it seems to rest does not appear to have been made the foundation of any subsequent decision of the Exchequer Chamber or of this House, and further, that some of the distinctions which have been engrafted on it, make the rule itself absurd. But it seems to me that it is not the rule which is absurd, but some of

(1) 5 Rep. 117 a.

(1) 1 Str. 426.

those distinctions, emanating from the anxiety of judges to limit the operation of a rule which they considered often worked injustice. That resolution in *Pinnel's Case* (1) has never been overruled. For 282 years it seems to have been adopted by our judges. During that whole period it seems to have been understood and taken to be part of our law that the payment of a part of a debt then due and payable cannot alone be the foundation of a parol satisfaction and discharge of the residue, as it brings no advantage to the creditor, and there is no consideration moving from the debtor, who has done no more than partially to perform his obligation. Though it may not have been made the subject of actual decision, yet we find that every judge in this country who has had occasion to deal with the proposition states the law to be so. And in the sister country it has always been so received, and in the case of *Corporation of Drogheda* v. *Fairtlough* (2) Lefroy C.J. thus expresses himself—I may say that his language is entitled to very considerable weight; he was a judge who had sat at the feet of Lord Kenyon, and he was the well-known reporter of the decisions of Lord Redesdale. That very learned judge thus states the law:—"There is also a failure of evidence of the consideration for the contract to remove the rule of the common law that payment of a less sum cannot be a satisfaction of a greater liquidated sum, unless there is some further advantage accompanying the payment." And in another part of his judgment he puts the proposition thus:—"The payment merely of a less sum, not being in pursuance of any contract by deed, cannot by the common law be deemed to be a satisfaction of a greater liquidated sum, but the law will allow the payment of a smaller sum to be a satisfaction of a greater liquidated sum if there be any collateral advantage, however small, to the creditor attending the transaction." The question did arise directly in that case, but the plea failed in other points, and it was, therefore, not necessary actually to decide it. I refer to it as shewing how a judge of great experience considered the law to stand.

I am not aware of any decision that controverts this position, and the text-books uniformly present it thus; that "the payment of part of a liquidated and ascertained sum is in law no

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(1) 5 Rep. 117 a.

(2) 8 Ir. C. L. R. 98, 110, 114.

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satisfaction of the whole." The proposition itself is but a part of a rule of our law, which affects and governs many of the daily relations of life, "Nuda pactio obligationem non parit." And, again, the law says that "nudum pactum est ubi nulla subest causa præter conventionem."

I should hesitate before coming to a decision which might be a serious inroad on that rule, but I concur with my noble and learned friend that it would have been wiser and better if the resolution in *Pinnel's Case* (1) had never been come to, and there had been no occasion for the long list of decisions supporting composition with a creditor on the rather artificial consideration of the mutual consent of other creditors. We find the law to have been accepted as stated for a great length of time, and I apprehend that it is not now within our province to overturn it.

The short question then is, in relation to a judgment debt payable immediately, and on which the creditor is entitled to have execution, is the payment by the debtor of a part a sufficient consideration to support a parol agreement by the judgment creditor not to take any proceedings whatever on the judgment for the residue? In my opinion it is not; and I think, therefore, that the judgment of the Court of Appeal should be affirmed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 16th May 1884.

Solicitor for appellant: *W. H. Hudson.*
Solicitors for respondent: *Mackreth, Bramall, & White.*

(1) 5 Rep. 117 a.

[HOUSE OF LORDS.]

(APPEAL COMMITTEE.)

EMMA CLEAVER . . . . APPELLANT;

AND

FREDERICK CLEAVER . . . . . . RESPONDENT.

H. L. (E.)
1884
May 23.

Practice—Competency—Limit of Time to Appeal from Decision of Court of Appeal in Cases from Probate and Divorce Division—Statute, 1868—*Judicature Act,* 1876—*Judicature Act,* 1881.

Since the Judicature Act of 1881, an appeal to the House of Lords in a matrimonial cause (where an appeal lies) can only be from a decision of the Court of Appeal; and such an appeal must be brought within one month after the decision appealed against is pronounced by the Court of Appeal, if the House of Lords is then sitting, or if not, within fourteen days after the House of Lords next sits.

PETITION for leave to appeal from an order of the Court of Appeal, refusing an application to reverse an order of Sir James Hannen, and a petition for leave to appeal from an order of the Right Hon. the President of the Probate Division pronouncing a decree nisi for a dissolution of marriage absolute.

Emma Cleaver presented a petition for dissolution of her marriage with her husband Frederick Cleaver on the ground of cruelty and adultery. The husband had also lodged a petition for dissolution on the ground of his wife's adultery. It is only necessary for this report to state that the case was heard on the 2nd and 3rd of March, 1883, before the President of the Probate Division and a common jury. The jury found a verdict for the Petitioner, Emma Cleaver, and found the husband's allegations were not proved, and a decree nisi with costs was pronounced. On the 5th of April, 1883, Mr. Cleaver applied in person to Sir James Hannen for a new trial, and having been refused, he applied also in person to the Court of Appeal (No. 2) to reverse the order refusing a new trial. The application stood over for evidence to be produced, and on the 9th of May Mr. Cleaver urged his appeal in person. It was dismissed with costs by Baggallay, Lindley, and Fry, L.JJ.

In June he lodged an appeal against the decree nisi in the House of Lords, which was informal, not being signed by two counsel.

On the 9th of November, 1883, the decree nisi on motion was made absolute by Sir James Hannen. The appellant appeared in person, and read an affidavit to the effect that further evidence had been discovered.

On the 30th of November he lodged an appeal to the House of Lords from the decree absolute under the Act of 1868, which stood over to be signed by counsel, and on the 4th of April the appeal was presented correctly signed.

On the 7th of May, 1883, he lodged an appeal from the order of the Court of Appeal (1) under Standing Order No. 1 (2) of the House, and petitioned that the two appeals might be conjoined.

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(1) Sect. 9 of the Judicature Act, 1881 (44 & 45 Vict. c. 68), is as follows:—

"All appeals which, under section fifty-five of the Act of the twentieth and twenty-first years of Her present Majesty, chapter eighty-five, or under any other Act, might be brought to the full Court established by the said first-mentioned Act, shall henceforth be brought to Her Majesty's Court of Appeal and not to the said full Court.

"The decision of the Court of Appeal on any question arising under the Acts relating to divorce and matrimonial causes, or to the declaration of legitimacy, shall be final, except where the decision either is upon the grant or refusal of a decree on a petition for dissolution or nullity of marriage, or for a declaration of legitimacy, or is upon a question of law on which the Court of Appeal give leave to appeal; and, save as aforesaid, no appeal shall lie to the House of Lords under the said Acts.

"Subject to any order made by the House of Lords, in accordance with the Appellate Jurisdiction Act 1876 (39 & 40 Vict. c. 59), every appeal to the House of Lords against any such decision shall be brought within one month after the decision appealed against is pronounced by the Court of Appeal if the House of Lords is then sitting, or, if not within fourteen days after the House of Lords next sits.

"This section, so far as is consistent with the tenor thereof, shall be construed as one with the said Acts."

"Sect. 10. No appeal from an order absolute for dissolution or nullity of marriage shall henceforth lie in favour of any party who, having had time and opportunity to appeal from the decree nisi on which such order may be founded, shall not have appealed therefrom."

(2) "Standing Order I.:—Ordered, that, except where otherwise provided by statute, no petition of appeal be received by this House unless the same be lodged in the Parliament Office for presentation to the House within one year from the date of the last decree, order, judgment, or interlocutor appealed from."

On the 23rd of May, 1883, an appeal committee met and the parties and agents being called in:—

EARL OF SELBORNE, L.C.:—It would be as well to take, in these applications, first that relating to the competency of the appeal from the decree nisi made absolute. My present impression is, subject to anything which may be said for the appellant, Mr. Cleaver, that the appeal to this House in matrimonial as well as in other cases can only be from a decision of the Court of Appeal.

Agent for appellant:—It is submitted that the right still exists under the 3rd section of the Act of 1868, of a distinct right of appeal to the House of Lords from the decree absolute if lodged within one month.

[EARL OF SELBORNE, L.C.:—The Act of 1868, which was passed before the Judicature Acts and before the present Appellate Jurisdiction Act, gave a right of appeal to the House of Lords within a certain time after final decree, that is, the decree absolute, if the appellant had already defended when the decree nisi was made. But the Judicature Acts have been passed since, and my impression is that they limit the appeal to this House to cases which have passed through the Court of Appeal.]

That may possibly be the intention but is not the fact, and the right given by the Act of 1868 still exists.

[EARL OF SELBORNE, L.C.:—But a subsequent Act which is inconsistent with it so far repeals the former one. I do not say that you may not be able to make out your case, but the principle is clear. The present appellate jurisdiction depends upon the Act of 1876.]

That Act does not affect this right of appeal under the Act of 1868; it is a statutory right of appeal, and it is evidently referred to in the Supreme Judicature Act of 1881, the 10th section of which clearly points to the right of appeal existing.

[EARL OF SELBORNE, L.C.:—That does not determine from what Court the appeal is to be brought. That 10th section is: "No appeal from an order absolute for dissolution or nullity of marriage shall henceforth lie in favour of any party who, having had time and opportunity to appeal from the decree nisi on which said order may be founded, shall not have appealed therefrom." That undoubtedly limits the right of appeal in a certain case, but it does not say that an appeal to the House of Lords can be direct from the Probate Division.

The decree nisi is appealable, but is appealable to the Court of Appeal, and if the Court of Appeal affirm the decree nisi, you having appealed against it, have the right also to appeal against the decree absolute; and having the decision of the Court of Appeal against you, you can appeal here both against the decree nisi and against the decree absolute. And there does seem to be an appeal from the Court of Appeal. I hold in my hand a document which mentions it; it says, "An order of the 9th of May 1883, of the Court of Appeal."]

Agent for respondent:—Some verbal expression such as that there quoted has no doubt been given, but no such order has been pronounced, nor was that appeal presented in the manner and form which the rules applicable to that Court regulate. The 77th rule of the rules relating to divorce appeals provides that "an appeal to the full Court" (which is now the Court of Appeal) "from a decision of the judge ordinary, must be asserted in writing, and the instrument of appeal filed in the registry within the time allowed by law for appealing from such decision, and the rule directs that it shall be served—no such instrument has been filed or served, and no such instrument is set out in the document referred to.

[EARL OF SELBORNE, L.C.:—That is not at all conclusive. The mere fact that the party may have omitted to do things proper to be done, which may be the reason why the Court of Appeal dismissed the appeal, does not prevent an appeal to this House being allowed.

LORD BLACKBURN.—Do you say that this is an appeal direct from the Judge Ordinary?]

It is. The appellant seeks to bring to this House appeals against three orders—he appeals against the decree nisi pronouncing the dissolution of marriage—that is, a final decree so far as he is concerned. He appeals against the decree absolute pronounced upon that decree nisi—he appeals against what is an imaginary decision of the Court of Appeal. Every one of those appeals which are brought here is bad. First, as to the decree nisi, there are two objections: he cannot come to this House direct from the Judge Ordinary; and secondly, he has not presented the petition in time; and there is another objection, namely, that he cannot come against the decree absolute when he has neglected to appeal against the decree nisi.

[LORD BLACKBURN:—Supposing that this occurs: that he could not come from the Judge Ordinary without going through the Court of Appeal, the first two points would seem to be a ground for dismissing this appeal; but if that is not so the other points seem fit enough to be discussed, not for dismissing the appeal, but to consider whether the application should be granted.]

Assuming that the appellant relies upon the Act of 1868, then that is entirely varied by the Judicature Act of 1873, which intended originally to take away appeals to this House from intermediate Courts. Before that Act came into force the Appellate Jurisdiction Act passed, which gave an appeal from the Court of Appeal only to this House; and then finding that there were certain outstanding appeals from the full Court, this section of the Act of 1881 was passed, which says, first of all, that all appeals under a certain section which might be brought to the full Court, shall henceforth be brought to the Court of Appeal; and then, changing the word in the 9th section to "Acts," it says that "save as aforesaid no appeal shall lie to the House of Lords under the said Acts." Now that section says this: "The decision of the Court of Appeal shall be final except where the decision," &c., "is upon the grant or refusal of a decree of dissolution of marriage." Seeing that the intermediate Court was established after the Act of 1868, and seeing that that Act has been followed by these two amending Acts, it seems clear that no appeal any longer lies from the Judge Ordinary direct to this House.

[EARL OF SELBORNE, L.C.:—You will at present address yourself to that petition which is in the form of a direct appeal from the Probate, Divorce, and Admiralty Division of the High Court.]

Agent for appellant:—With regard to the 9th section of the

Act of 1881, the first paragraph of that section particularly specifies that the appeals which might be brought to the full Court shall henceforth be brought to Her Majesty's Court of Appeal. That was the sole reason why that Act was passed, because between the Act of 1876 and the Act of 1881 there were several cases brought to the Court of Appeal, namely, *Westhead* v. *Westhead* (1), *Robinson* v. *Robinson* (2), and *Gladstone* v. *Gladstone* (3). In those cases the Court of Appeal decided that they had no jurisdiction, and referred them to the full Court of Divorce. That being so, the 9th section, it is submitted, applies solely to an appeal brought to the full Court.

[LORD WATSON:—It is very unfortunate for the appellant, because this 9th section positively declares that "the decision of the Court of Appeal on any question arising under the Acts relating to divorce and matrimonial causes shall be final" except in certain cases, "and save as aforesaid no appeal shall lie to the House of Lords under the said Acts." The provision made "as aforesaid" is for an appeal from the Court of Appeal.]

It is submitted that the Act of 1868 has never been repealed.

Agent for respondent:—When Her Majesty's Court of Appeal was established and when an appeal was given from that Court to this Court there remained certain interlocutory orders outstanding, such as appeals against orders for custody and appeals against orders for aliment, which it was doubtful whether the legislature had covered, and therefore there was a doubt whether the full Court did not exist for those limited purposes; and this first paragraph of sect. 9 of the Act of 1881 was passed, which wiped up these omitted appeals and sent them up to the Court of Appeal instead of to the full Court.

[EARL OF SELBORNE, L.C.:—Am I not right in supposing that under the Act of 20 & 21 Vict. c. 85 the appeal to this House was from the full Court and not from the other Court?]

At the institution of the Divorce Court appeals from the decree of the original Court lay to this House within three months.

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(1) 2 P. D. 1.

(2) 2 P. D. 77.

(3) 2 P. D. 143.

Later the jurisdiction of the full Court with regard to cases of divorce was vested in the Judge Ordinary, and the appeal was from the Judge Ordinary direct to this House. Then the Act of 1868 was passed which cut down the three months to one month, for this reason, that the parties could not remarry after a dissolution of marriage pending an appeal, and it was highly desirable that that time should be curtailed and that these appeals should be prosecuted speedily. Then with regard to the appeal, if it is an appeal from Her Majesty's Court of Appeal it is out of time, because on the face of the appeal it is more than twelve months, and by the section no appeal can be brought to this House from any order of Her Majesty's High Court of Justice except within one month from its date. Assuming for the purpose of argument that it was a decision of the Court of Appeal, the appeal is bad as being out of time.

[EARL OF SELBORNE, L.C.:—The order of the Court of Appeal is dated the 9th of May, 1883. That is subject to any order which may have been made under the Judicature Act (Standing Order No. 1 read).]

It is submitted that that order is anterior to the Act in question, and therefore that Act being an Act of the legislature overrides the standing order.

[EARL OF SELBORNE, L.C.:—Sect. 9 of the Act of 1881 says: "Subject to any order made by the House of Lords in accordance with the Appellate Jurisdiction Act, 1876," and that Act contains an express clause giving the House ample power to regulate its own procedure about the conditions of appeals. The 11th section of the Act of 1876 says that it shall be "subject to such conditions as to the value of the subject-matter in dispute and as to giving security for costs, and as to the time within which the appeal shall be brought, and generally as to all matters of practice and procedure or otherwise, as may be imposed by orders of the House of Lords." Then the question is, What is the effect of this Standing Order No. 1? I see that it states this:—"Ordered that, except where otherwise provided by statute, no petition of appeal be received by this House unless the same be lodged in the Parliament Office for presentation within one year from the date of the last decree," and so forth. That does not give an affirmative right to appeal within the shorter time which the statute may have provided, but it excludes the right of appeal (except as provided by statute) unless it be done within a year.]

Agent for appellant:—The standing order is binding to the extent that the right of appeal is simply within a year from the date of the last decree, and the decision of the Court of Appeal was made on the 9th of May; and as to its being subject to any standing order made by the House, it must refer to the statute then passed, it could not take into consideration an Act passed five years afterwards, whereas the subsequent Act distinctly excepts what the House of Lords have before them.

EARL OF SELBORNE, L.C.:—It seems to me that the standing order does not apply to the case at all. It says that with that exception mentioned, no petition of appeal shall be received unless lodged within a year, it does not say that the petition shall be received if it is presented within a year, in any case in which an Act of Parliament has provided that a petition of appeal shall only be received if it is lodged within a shorter time. Their Lordships are of opinion that these appeals are incompetent and that they must be dismissed. In the first place, appeals direct from the Probate Division of the High Court are incompetent for this reason. The Act of 1868 was passed before the Judicature Acts, when there was a separate Court, and the appeals were then regulated upon different principles from those upon which they have been regulated since. If the Act of 1873, the first Judicature Act, had remained in force, there would have been no appeal at all to the House of Lords, and every appeal must have been to the Court of Appeal. Then by the Act of 1876 it is said: "Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the Courts following, that is to say:—(1) Of Her Majesty's Court of Appeal in England," and then of any Court in Scotland, and then of any Court in Ireland—any Court in those countries from which error or an appeal would have lain before by common law or by statute, the distinction being very broad. And in the 11th section it is enacted that "After the commencement of this Act error shall not lie to the House of Lords, and an appeal shall not lie from any of the Courts from which an appeal to the House of Lords is given by this Act, except in manner provided by this Act." That is confirmed by the Act of 1881, the 9th section of which says that instead of an appeal to the old full Court in the Probate Division there shall be substituted an appeal to the Court of Appeal; and it goes on to say that the decision of the Court of Appeal upon any of these questions shall be final with certain exceptions; "and save as aforesaid no appeal shall lie to the House of Lords under the said Acts," that is to say that no appeal shall lie to the House of Lords except in the cases which are contemplated there. That seems enough to exclude altogether an appeal attempted to be brought direct from two orders of the matrimonial judge; and, with regard to the order in the Court of Appeal, that was pronounced very nearly a year before this appeal was presented. If the case is governed by the Act of 1881, that was too late; for the Act of 1881 requires it to be brought within one month if the House of Lords is then sitting, as in this case it was; and the standing order does not enlarge the time limited by the Act of 1881, it does not say that where a statute has fixed a shorter time, that shorter time shall be enlarged and made into a year. I must say that the whole manner in which this case has been conducted leaves me under this impression, that we are not only following the letter of the law in dismissing these appeals, but that we are running no risk of doing any substantial wrong.

The appellant is a pauper, and taking all the circumstances into consideration we think that justice will be done by giving no costs.

LORDS BLACKBURN, WATSON and FITZGERALD, concurred.

This decision was reported to the House, and agreed to.

Lords' Journals, 27th May, 1884.

Agent for appellant: *Charles D. Browning.*

Agents for respondent: *Sharpe, Parkers, Pritchard, & Sharpe.*

G. J. W.

[HOUSE OF LORDS.]

H. L. (Sc.)
1884
June 23.

MACLAREN AND OTHERS . . . . APPELLANTS;

AND

COMPAGNIE FRANÇAISE DE NAVIGATION À VAPEUR AND OTHERS . . . RESPONDENTS.

Ship—Collision—Damage—Liability for Collision—Equal Negligence—Regulations for Preventing Collisions at Sea—Sailing Rule 18.

In accordance with the 18th sailing rule, under Order in Council, 14th of August, 1879, it is the duty of those in charge of a steamship in motion, when they perceive that a risk of collision is involved, to reverse their engines and bring their ship to a standstill on the water.

A collision occurred between the steamship *A.* and the steamship *B.* The evidence was most contradictory. It was, however, satisfactorily proved that although the crew of the ship *B.* had been until a few minutes before the collision engaged in getting the anchors on board in shipshape order, and that the captain had left the deck when he ought to have been there, yet that when it was perceived the two vessels were approaching in such a manner as to involve risk of collision the engines were reversed, and the ship stopped. On board the ship *A.* everything was proved to have been in good order at the time of the collision. But her captain did not stop his engines until almost the moment of collision, and consequently the ship *A.* cut into the ship *B.* to the water's edge:—

Held, reversing the decision of the Court below, that there was fault on both sides, contributing to the damage and loss which had been suffered, and therefore neither were entitled to damages.

APPEAL from the Second Division of the Court of Session, Scotland.

On the 17th of November, 1881, the *Thames* and the *Lutetia* collided near Oran.

The owners of the steamship *Thames*, the appellants, raised an action for damages against the steamship *Lutetia*, owned by the Compagnie Française de Navigation; and that company instituted a cross-action for damages, as owners of the *Lutetia*, against MacLaren and others, as owners of the *Thames*.

The facts as proved were substantially as follows: The *Thames* had left Oran bound on a voyage to Valencia, and was steering nearly N.N.E., close in shore. The *Lutetia* was making for Oran

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harbour on a voyage from Marseilles, and her course was S.S.W. A little after 8 P.M. on the night in question the vessels came in sight of each other, being then about two miles apart. The steamer *Thames* left Oran with her anchors dragging, and the crew were engaged in getting them on board until within a few minutes of the collision. At the time of the collision the captain was in his cabin. Immediately after it occurred he ran on deck and jumped on board the *Lutetia* in his shirt and trousers, and was very much excited. The crew of the *Lutetia* alleged that he was drunk—this the crew of the *Thames* denied. The evidence of the mate of the *Thames*, who was in command of the vessel when the vessels collided, was to the effect, that when he came in sight of the *Lutetia*, he saw her red light, indicating to him that she was coming to his port side, and he accordingly turned his ship's head two points to starboard, or towards the shore. Shortly after he perceived that it was impossible to avoid a collision, he therefore, in accordance with the 18th sailing rule (1) ordered the engines full speed astern, and before the collision actually took place, the *Thames* was standing almost still on the water. The evidence of the captain of the *Lutetia* was that he thought he saw the green light of the *Thames*, indicating that she lay to starboard, and he altered his course half a point to starboard, or in shore. The *Lutetia* struck the *Thames* stem on, and cut her down to the water's edge, the *Lutetia* was also seriously damaged. Both vessels made for the port of Oran.

The remaining material parts of the evidence can be gathered from the Law Lords' opinions.

The Lord Ordinary (2) being of opinion that the collision was caused by the fault of the *Lutetia*, pronounced an interlocutor to that effect.

The owners of the *Lutetia* reclaimed, and the Second Division (3) differed from the Lord Ordinary, and on the 5th of December, 1883, recalled his interlocutor.

The Lord Justice-Clerk said: "Is there any preponderating evidence on either side, or is there an equality in the evidence of both? I am of opinion the parties are not on equal terms here, that there is a clear balance of evidence in favour of the French crew, for their opportunities of observation were better than those on board the British ship. The French vessel was well manned, in good order, and commanded by a skilled navigator, who was in the habit of sailing this particular voyage, and could not possibly on a clear night, such as the one in question, have mistaken a green for a red light. I cannot say as much for the *Thames*. She had started with her anchors dragging, and they were fouled to such an extent that she had to stop altogether after she had left the harbour, in order to get them on board again. In the second place the captain, though the crew was shorthanded for the work, left his post on deck and went below, knowing that the vessel was being navigated under difficulties, and did not wait to see the anchors put right. That is a serious matter where it turns out that a collision takes place, and a captain not on duty in such circumstances is certainly to blame, unless it can be shewn that his duty has been discharged by some one else equally capable. In the third place I cannot help coming to the conclusion that the captain was not in a position to discharge his duty. The evidence on this point is, I think, complete, and the master of the *Lutetia* speaks in forcible terms as to the captain of the *Thames* having leaped on board the *Lutetia* after the collision in a drunken condition. My whole ground of judgment, then, in the case is, that I find in it those elements which entitle me to believe one set of witnesses and to doubt another. In my opinion the French captain and his crew have entirely vindicated their conduct in the matter" (1).

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(1) The 18th sailing rule, under Order in Council, dated 14th of August, 1879, is as follows: "Every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary," see Maude and Pollock's Mer. Ship. (4th Ed.) p. 177.

(2) Lord M'Laren.

(3) 21 Scot. Law Rep. 177.

Lords Young, Craighill, and Rutherfurd Clark, concurred.

On appeal,

May 6, 8, 9. *Webster*, Q.C., and *Bucknill*, were heard for the appellants.

Dr. *Phillimore*, Q.C., and *Stubbs*, were heard for the respondents.

The House took time for consideration.

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(1) 21 Scot. Law Rep. 177.

1884. June 23. EARL OF SELBORNE, L.C.:—

In this case I agree generally with the reasons which have led the Second Division of the Court of Session to the conclusion that the *Thames* cannot be exonerated from blame for the collision which happened, and I do not think it necessary to repeat those reasons.

But the question remains whether the *Lutetia* was free from blame. It does not follow, because there was not a proper look-out on board the *Thames*, that there was a good look-out on board the *Lutetia*, or that credit should be given to all the statements of the witnesses for that vessel. I find it very difficult to satisfy myself where the real truth lies, as to the relative courses of the two vessels from the time when they first saw each other down to that of the collision, and as to the precise length of that interval of time; but there is one point, on which the burden of justifying her conduct seems to me to be cast upon the *Lutetia* by facts which are beyond serious question. The 18th sailing rule, under the Order in Council of the 14th of August, 1879 (agreed to by France and all the other nations mentioned in the second schedule to that Order), is that "every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary." Did or did not the *Lutetia* comply with that rule? If she did not, was her omission to do so a contributory cause of the collision, or of the damage which followed?

It is proved to my satisfaction, that on board the *Thames*, at all events, the danger of collision was perceived in sufficient time to enable the engineer to receive and act upon the necessary orders to reverse the engines and stop the ship, and that the *Thames* was actually stopped before the collision took place. Cameron, her first mate, says, "When I saw the *Lutetia's* green light opening to us, I saw that it was impossible to avoid a collision then, and I sang out at once to put the engines full speed astern, to avoid being struck amidships. That was sung out to the officer on the bridge, the second mate. To the best of my knowledge, that order was carried out, because the vessel was stopped." Gordon (the look-out man), Dawson (the cook), McMillan (the chief engineer), and Anderson (the helmsman), all confirm this state-

Earl of Selborne, L.C.

ment. McMillan says that, when the *Thames* was struck, she was going full speed astern; that if it had not been so, they would all have been scalded with water from the boilers; that "her headway was just stopped, no more." The entry in his log agrees substantially with that statement; being, that they "were going astern for about a minute and a half."

As to the *Lutetia*, Cameron says that she struck the *Thames* at nearly right angles, on the port bow; that she "nearly went right through;" he "could not say whether she slackened her speed, but, by the appearance of the shock, she could not have slackened." Gordon says, "she (the *Lutetia*) must have been going a good speed, half or whole, I could not say which; she must have been going half speed, whatever more, according to her way, and the shock she gave us." McMillan thus describes the injury: "She (the *Thames*) was cut right through and through. Her plates were cracked, right on the other side of the ship." "She was cut from deck to keel," "from port to starboard." These statements are confirmed by other unimpeachable evidence. A sketch in section, verified by the witness Wallace, was produced to the House, shewing the position of the gap in the vessel (the *Thames*), and the relative size of it. Mr. Harvey, a foreman shipwright of Glasgow, of long experience, examined that ship when brought in for repair. In reply to the question, "From the appearance of the blow which the *Thames* had received, do you think she could have been going at a high rate of speed when the collision occurred, or could you tell what rate of speed?" he said, "I could not tell or form any opinion upon the subject; but I do not think she could have been, from the damage she sustained, going fast. She must have been going very slow." The *Lutetia*, which struck her, "must have been going at a considerable speed." "From the position of the blow, the vessels had struck each other nearly at right angles into the port bow." Being asked by the Court, "You say that the *Thames* must have been going slow when she was struck; what leads you to form that opinion?" He answered, "From the incision in the *Thames*; we found she was cut through, right to the starboard side;" adding his reasons for thinking that the appearances would have been very different, and that the damage would have been much greater, and would have extended further aft on the port side, if the *Thames* had been going faster (the other conditions being the same).

I believe this evidence; and I cannot but myself draw the same conclusion from Mr. Wallace's sketch; although Granello (the boatswain of the *Lutetia*) said, that "the *Thames* was going faster than the *Lutetia* at the time of the collision. She was going, at any rate, six or seven knots, if she was not going more."

When the statements made, at different times, by the witnesses for the *Lutetia* are examined, inconsistencies are found in them, which make it very difficult to believe that there was such a look-out on board that vessel as there ought to have been. In the log of the *Lutetia* there is no mention of the time when the *Thames* was first sighted, or when either her green or red light was seen before the collision. The only entry on the subject is this:—"About nine o'clock at night, finding myself about two miles from the port of Oran, I was run into by an English steamer, which had made a false manœuvre." That entry must necessarily have been made after both ships had come into port. A report is also mentioned in the log as having been then made out and signed by the captain and all the crew; but that report was not produced in the cause. In the depositions before the Tribunal of Commerce at Oran, made soon afterwards, Captain Garrigue said that the *Thames,* shewing "a green light in the wake of the starboard cat-head, as well as a white light," was first seen "about 9 P.M., when about two miles distant from Oran harbour light," and he added that the collision took place about ten minutes afterwards; and Rouquet (mate of the *Lutetia*) placed an interval of not more than fifteen minutes between the time when he first saw the green and white lights and the appearance of the red light, when (he says) "the collision took place almost instantaneously." The answers for the *Lutetia* on the present record are, both as to time and as to distance, to the same effect. In his evidence at the trial, Captain Garrigue fixed the distance of the *Thames,* when her green light was first seen, at four or five miles; adding (as did his other witnesses) that she "was about two miles from Oran when the collision took place." "Granello (the boatswain) represented the time when the green and the white masthead lights of the *Thames* were first seen as "a few minutes" after he came on watch at 8 P.M., which would be about an hour before the time of the collision as stated in the log. The evidence of Luigi, the helmsman, was to the same effect; and the collision, according to him, took place in less than half an hour afterwards. This, as to the time of the collision, agrees substantially with the statements in the log of the *Thames*, and of the witnesses for that ship. I cannot reconcile the statements (contemporaneously made) in the log of the *Lutetia* with this evidence at the trial.

With respect to the conduct of the *Lutetia* when the collision had become imminent, the statement made at Oran by Moreau (the chief engineer of the *Lutetia*) differs altogether from his own and the other evidence at the trial. Moreau then said that "the speed of the" (*Lutetia's*) "engines had been reduced, and the dampers almost closed, six or seven minutes before the collision. They were stopped and reversed, and they were going astern before the collision." But at the trial he said, "After I went on duty, the first order I received was to ease the steam. That was between eight and nine o'clock. I obeyed that order. The next order was to stop, and immediately after stop, I got an order to go full speed astern. I obeyed these orders as soon as they were given. The collision took place nearly at the same time as the order to go astern, a moment after." And Captain Garrigue said, "When the red light of the *Thames* was shewn, we were so close that the collision took place instantaneously." "I stopped the engines and turned her astern," but "she had not commenced to go astern before the collision; the headway was not off her." He had "at that time neither time nor opportunity for executing any manœuvre by which he could have saved the collision. The vessel had not had time to answer her helm when the collision took place. She was going about three knots at the moment of the collision."

Looking at these and some other varying statements of the witnesses for the *Lutetia* (in a case in which the evidence as to the lights seen from each ship is so contradictory as to make the discovery of the truth more than usually difficult); to the statements of her log as to time and distance, and its silence on the most material points; to the non-production of the contemporaneous report made at Oran; to the statement of the witness Granello as to the speed of the *Thames* at the moment of collision, which agrees with the pleading in the record; and to the fact that the damage done to the *Lutetia* by the *Thames* (which reversed her engines and stopped before the ships came into contact, was small, while that done to the *Thames* by the *Lutetia* (which did not stop or reverse, though she may at the time have been going at less than full speed) was so much more extensive and serious, I am unable to come to the conclusion that the plea of unavoidable necessity, alleged by Captain Garrigue for his non-compliance with the 18th sailing rule, has been satisfactorily made out; on the contrary, I think the just conclusion from the evidence, as a whole, is that there was fault on both sides, contributing to the damage and loss which has been suffered; and I move your Lordships so to declare, and with that declaration, to remit the case to the Court below, giving no costs of the appeal.

Lord Blackburn concurred.

Lord Watson:—

My Lords, I am unable to take the same view of the facts of this case as the learned Lord Ordinary, in whose presence the leading witnesses were examined. His Lordship came to the conclusion that, at the time when their side lights became visible, both vessels were heading towards the coast, "so that their courses would cross each other obliquely at an angle of at least two-and-a-half points." In that position the green light of the *Lutetia* was opposed to the red light of the *Thames*; and his Lordship held that the *Lutetia* was alone to blame for the collision, because she ought to have observed the red light of the *Thames*, and ought, in consequence, to have put her head to starboard and passed to seaward of the *Thames*. Had I been able to accept the Lord Ordinary's view of the facts, I should have held that there was no look-out, or at all events an insufficient look-out, kept by either vessel; because, according to that view, the red light of the *Thames* was visible to the witnesses from the *Lutetia*, whereas they all say that they only saw a green light, and those on board the *Thames* could only see the green light of the *Lutetia*, and yet they all state that her red light alone was visible.

I am of opinion that the Judges of the Second Division did right in rejecting the theory by which the Lord Ordinary accounts for the collision; and I also agree with them that the evidence is sufficient to fix liability upon the owners of the *Thames*. Having regard to the condition of the vessel and the occupations of her crew before the collision occurred, I think it is matter of reasonable inference that due care and vigilance were not observed by those who were navigating her. I do not lay any stress upon the alleged intoxication of the captain; indeed, I doubt whether it is proved that he was the worse from liquor. But whether he was intoxicated or not, the fact remains that he went down to his cabin and stayed there during a critical period, whilst his somewhat shorthanded crew were so fully occupied in endeavouring to get the vessel into proper trim, as to have little leisure for attending to her navigation. Cameron, the first mate, no doubt says that he was in command after the captain left the deck, but I infer from his evidence that he did not know when that duty devolved upon him. What he does say is, that "the captain must have gone down to his tea at the time we stopped;" and from an answer given by him to the Court, it appears that, when the vessel was about to start after her stoppage, he was informed by Cleary, the second mate, that the captain had gone down to his tea. Cleary, at that time, knew that the captain was below, but he states that he did not know "when he went away or where he went to;" but, if Anderson, the man at the wheel, is to be relied on, the captain must have left the deck at least a quarter of an hour before her stoppage. The first mate, who was in command after the stoppage, was never upon the bridge, and although he does say that he kept an eye upon the *Lutetia* after she was first observed, he was on the forecastle attending either to the shipping or to the lashing of the anchors down to the time of the collision. I am willing to assume that the anchors had been shipped for an appreciable time before the collision took place; but in considering whether a proper look-out was kept, it is impossible to disregard the fact that, after they were taken in, there were, including the look-out man, only four seamen on the forecastle to do the ordinary work of five. These circumstances are not calculated to afford any presumption that a proper look-out was kept. On the contrary, I think the reasonable conclusion to be derived from the evidence is that, owing partly to their having started without taking their anchors on board, and partly to the captain leaving his post at the time he did, the officers of the *Thames* were unable to give, or did not give, to the navigation of the vessel, that degree of attention which might probably have prevented the collision.

Whilst I concur with the Judges of the Second Division in holding that blame attaches to the *Thames*, I am not prepared to assent to their judgment in so far as it acquits the *Lutetia* of contributory fault. I think there are sufficient grounds for coming to the conclusion that the *Lutetia* either failed to keep a good look-out, or neglected to take proper precautions for averting or diminishing the force of the collision.

The statement which the respondents make in their record (Condescendence 2), after setting forth that the vessels were approaching green to green, when the *Thames* suddenly opened her red light, thus proceeds :—" Seeing the *Thames* thus crossing the bow of the *Lutetia*, the captain of the latter vessel at once starboarded her helm, stopped her engines and reversed them full speed, and did everything he could to avoid, or at least to diminish, the effect of any collision. The *Thames*, when she shifted her helm as aforesaid, was going at too great a speed, and in breach of the rules and regulations aforesaid, she did not slacken speed, nor did she stop and reverse her engines, and the two ships came into collision, the port bow of the *Thames* striking the starboard bow of the *Lutetia*." Now, for my own part, I cannot regard these averments as other than the deliberate statement of the parties who are responsible for the navigation of the *Lutetia*, or as of less importance than if they had occurred in the log of the vessel, or in particulars delivered in the Court of Admiralty. To admit the suggestion that they ought to be treated as an erroneous account given by the professional advisers of the party, would, in my opinion, be to destroy the usefulness of a Scotch record in all cases of collision at sea. In the present case I cannot discover in the respondent's evidence any indications of an intention to abandon or to discredit these allegations in respect to the speed of the *Thames* at the moment of collision. Granello, the boatswain of the *Lutetia*, who was officer of the watch at the time of the collision, and the only witness for the respondents who speaks to the speed of the *Thames*, says, "the *Thames* was going faster than the *Lutetia* at the time of the collision. She was going, at any rate, six or seven knots an hour."

If it had been proved that, as the respondents allege, the *Thames* was going through the water at considerable speed when the collision occurred, I should probably have come to the conclusion that she was alone responsible for the disaster. But I am satisfied that the account given by the respondents on record is untrue: and that is a circumstance which I cannot but regard as unfavourable to the *Lutetia*. I believe the testimony of the *Thames*' witnesses, which is to the effect that, at the moment of the collision, the engines of their vessel had previously been stopped and reversed, and that as the witness Gordon expresses it, her headway was "just about off." They are not directly contradicted, upon this point, by any of the *Lutetia's* witnesses except Granello, and they are, in my opinion, corroborated by the real evidence afforded by the condition of the *Thames* after the collision, which is thus described by Harvey, a witness above suspicion:—"She was cut through right to the starboard side. The stem was naked to the starboard side to fourteen inches, and at the foot, the lower part of the stem, four inches, and the lower part of the keel, at where the collision took place, was twisted and bent, and the clamped plate on the starboard side broken." To my mind, the nature of the injury thus described points very strongly to the inference that, whilst there was considerable way on the *Lutetia*, the *Thames* must have stopped, or nearly so. The *Lutetia* had, like the *Thames*, been steaming at half speed, that is, from three to four knots an hour, before the collision, and I have doubts as to the reliability of the evidence given by the witnesses from the *Lutetia* as to the stopping and reversing of her engines. To the statements of Granello, the officer of the watch, I attach no weight whatever, for he not only says that, at the time of the collision, the *Thames* was steaming ahead at a rapid rate, but that, after the collision, "her engines were still going, and she was dragging us with her." Of course, one would expect the most accurate evidence as to the actual stopping and reversing of her engines from the engineer of the *Lutetia*, and he does state that he got, and at once obeyed, the successive orders "Stop" and "Full speed astern," and that "the collision took place at nearly the same time as the order to go astern, a moment after," a statement which is, unfortunately, not very consistent with the deposition which he emitted at Oran. But, accepting the evidence given on this point by the witnesses from the *Lutetia* before the Lord Ordinary, it is obvious that the two vessels were at very close quarters before the orders to stop and reverse were given, and that hardly any of her way could have been taken off the *Lutetia* before they collided.

In that state of the facts, I think it is matter for serious consideration how the *Lutetia* came to maintain her speed almost till the moment of collision, whilst the *Thames* had slowed until she had nearly ceased to move forward. I have already indicated the reasons for which, in my opinion, the *Thames* cannot be acquitted of contributory fault, but it does not follow that the *Lutetia* must therefore have been free from blame. Assuming that the *Thames* was improperly steered, it is perfectly plain that she did something to avoid the collision. I can suggest no conceivable reason for her stopping and reversing, except that those on board of her had observed that the two vessels were approaching each other in such manner as to involve risk of collision, for an appreciable period of time before it actually took place. No matter how the two vessels were brought into that position of danger, if it were observable from the *Thames*, it must have been equally patent to those on board the *Lutetia*, if they were keeping a proper look-out. I am unable to resist the conclusion that they either neglected to keep a proper look-out, or that they failed to observe the provisions of rule 18. Had the *Lutetia* stopped and reversed her engines at the time when the risk of collision must have been apparent, even if the collision had not been avoided, I

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do not believe she would have cut through a vessel which had practically ceased to move.

The evidence on both sides (as too often happens in such cases) is very unsatisfactory, but the result of the best consideration which I have been able to give to it is that I am unable to acquit either vessel of contributory fault. In my opinion, therefore, the interlocutor under appeal ought to be reversed, and the two actions remitted, with a declaration that the collision was due to the fault of both vessels, and that neither of the parties should have their costs, either in this House or in the Courts below.

LORD FITZGERALD concurred.

Interlocutor appealed from reversed.

Actions remitted with a declaration that the collision was due to the fault of both vessels, and that neither of the parties should have their costs in the Court below, no costs of the appeal.

Lords' Journals, 23rd June, 1884.

Agents for appellants: *Lowless, Nelson, Jones & Thomas*, for *J. J. Ross, W.S., Edinburgh.*

Solicitors for respondents: *Stokes, Saunders & Stokes.*

[HOUSE OF LORDS.]

WILLIAM COOKSON AND SARAH, HIS WIFE . . . . } APPELLANTS;

H. L. (E.)
1884
May 23.

AND

SAMUEL SWIRE, JOHN SWIRE, AND SAMUEL LEES . . . . } RESPONDENTS.

Bill of Sale—Registration not renewed—Apparent Possession—Bills of Sale Acts 1854 (17 & 18 *Vict. c.* 36) *ss.* 1, 7—1866 (29 & 30 *Vict. c.* 96) *s.* 5—1878 41 & 42 *Vict. c.* 31) *s.* 8—1882 (45 & 46 *Vict. c.* 43) *s.* 3.

In 1873 S. executed a bill of sale of furniture to the respondents to secure a loan, with an absolute unconditional power to take possession and sell in case of default of payment upon demand. The bill was duly registered, but never re-registered. In 1883 the respondents, in order to protect the furniture from S.'s creditors, demanded payment and on default took possession of the furniture and sold it to C., giving him a receipt for the purchase-money though no money actually passed. At the same time C. not being able to pay executed a bill of sale of the furniture to the respondents to secure the purchase-money. This bill was duly registered: the receipt was not registered. The transaction with C. was found by the jury to be a bonâ fide one. The furniture having been afterwards seized under a fi. fa. against S.:—

Held, affirming the decision of the Court of Appeal, that the sale to C. being an absolute and bonâ fide transfer of the property the bill of 1873 was spent and satisfied, and the Bills of Sale Acts of 1854, 1866, 1878, and 1882 had no application whatever to it at the time of the execution, whether the furniture was or was not at that time in the apparent possession of S.; and that the respondents were entitled to the furniture.

APPEAL from an order of the Court of Appeal. The appellants having on the 25th of January 1883 recovered judgment against Samuel Vaughan for £734, the sheriff of Lancashire the next day seized under a fi. fa. certain household furniture at Croydon Villa, Blackpool, where the debtor was residing. A claim having been made by the respondents an interpleader issue was directed in which the respondents, as plaintiffs, affirmed, and the appellants, as defendants, denied that the goods seized were at the time of the seizure the property of the respondents as against the appellants. At the trial before Cave J. at Manchester in April 1883 the following facts were proved:—

On the 10th of May 1873 Samuel Vaughan being in difficulties the respondents paid his debts, and he executed a bill of sale whereby he assigned to the respondents the goods in question as security for loans amounting to £698 10*s*., with a proviso that if the grantor did not upon demand pay principal and interest the grantees might take possession and sell the goods by public auction or private contract upon such conditions and in such manner as they should think fit. This bill was duly registered, but was not re-registered at the end of five years or at all.

On the 23rd of December 1882 the appellants threatened the debtor with the action which they brought on the 8th of January 1883. At the end of December 1882 and after this threat it was agreed between the debtor's son Charles Vaughan and the landlord of Croydon Villa that the son should be the tenant instead of his father the debtor. At this time the debtor was paralysed and incapable. On the 11th of January 1883 the respondents served a demand for the money due under the bill of 1873 and put a man in possession, and a few days after the respondent Samuel Swire (brother-in-law of Samuel Vaughan) on behalf of the respondents agreed with Charles Vaughan to sell the goods in question to him for £250, and (though no money passed) gave him the following receipt:—

£250. Manchester, 19th January, 1883.

Received from Mr. Charles Vaughan the sum of two hundred and fifty pounds, being the purchase-money agreed to be paid by him for the whole of the household furniture and effects now being in about or upon the messuage or dwelling-house situate and being Croydon Villa, South Shore, Blackpool in the county of Lancaster.

S. SWIRE,
For self and co-mortgagees.

Charles Vaughan not being able to pay executed a bill of sale dated the 19th of January 1883, whereby he assigned the goods to the respondents as security for the purchase-money. This bill was duly registered. These proceedings were taken by the respondents to protect the furniture for the benefit of the persons for whom the respondents were trustees.

The jury found that the transaction between the respondents and Charles Vaughan was a bonâ fide one and found a verdict for the plaintiffs, the now respondents, and were then discharged by consent, Cave J. reserving the case for further consideration, with liberty to him to find any further fact that might be necessary.

Upon further consideration, on the 29th of May 1883, Cave J. while adopting and approving the finding of the jury that the transaction with Charles Vaughan was a bonâ fide one, found as a fact that the goods were at the time of the execution in the apparent possession of Samuel Vaughan, and held that the bill of 1873 was under the Bills of Sale Acts previous to 1882 void as against the execution creditors, it being necessary for the respondents in proving their title to rely on that bill; and the learned Judge entered judgment for the defendants, the now appellants.

The Court of Appeal on the 6th of November 1883 held that the transaction with Charles being a bonâ fide one the bill of 1873 was on the 19th of January 1883 satisfied, so that the Bills of Sale Acts had no application to it; but that if those Acts were applicable, then as a matter of fact the goods were not at the time of the execution in the apparent possession of the father Samuel, but were in the actual and apparent possession of the son Charles. The Court therefore reversed the judgment of Cave J. and entered judgment for the respondents.

May 21, 23. *Sir F. Herschell* S.G. and *Arthur Charles* Q.C. for the appellants:—

The Court of Appeal were wrong on the facts in holding that Samuel Vaughan was not in apparent possession at the time of the execution, and wrong in law in holding that the Bills of Sale Acts did not apply to the bill of 1873. The only title of the respondents to the goods was through and under the bill of sale of 1873. Assuming that that bill is governed by the Bills of Sale Acts of 1854 and 1866 or of 1878, not having been re-registered it would be void against execution creditors if the grantor were (as he was) in apparent possession of the goods at the time of the execution; and one question is whether the bill would be void when the grantees of that bill have parted with their interest by subsequent transactions. The words of sect. 8 of the Bills of Sale Act 1878 (41 & 42 Vict. c. 31) are similar to those of the Act of 1854 (17 & 18 Vict. c. 36) s. 1. It would defeat the whole object of these Acts if when the grantor remains in apparent possession the whole time the goods might be passed by a word of mouth transaction to another person who then makes a fresh bill of sale to the grantees of the first bill. That was what was done here: Samuel Vaughan the grantor of the bill of 1873 remaining always in apparent possession, and the goods being verbally sold to Charles Vaughan, who at the same time executes a fresh bill to the respondents. The question would not arise if the first grantor did not remain in apparent possession: if for instance the goods were removed: but if he does the case is within the Acts. The transaction was analogous to that in *Karet* v. *Kosher Meat Supply Association* (1), where it was held that such an arrangement could not defeat the Act. The respondents could only sell to Charles Vaughan that which they themselves had under the bill of 1873, and that bill being void for want of re-registration they could not confer on Charles Vaughan a better title than their own; nor could he cure the defect by giving a fresh bill which was registered: *Chapman* v. *Knight* (2).

[LORD BLACKBURN :—Under the bill of 1873 the grantees had power to sell absolutely; to sell more than they had themselves.]

In *Karet* v. *Kosher Meat Supply Association* (1) the first bill was (apparently according to the report) an absolute conveyance, not a mere security, and yet the transaction was held void. But even if the grantees of that bill had the power to sell absolutely and so as to be free from any equity of redemption they are in no better position than if they had been unlimited absolute owners in the first instance. The respondents gave no better title to Charles Vaughan than if instead of a verbal sale they had given him an unregistered bill. The receipt given to him required registration under the Act of 1878. A mere receipt for money need not be registered, but if it is intended as a record of the transaction it must: *Marsden* v. *Meadows* (1). This receipt was intended as a muniment, no money having passed.

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(1) 2 Q. B. D. 361.

(2) 5 C. P. D. 308.

The decision of the Court of Appeal that Samuel Vaughan was not in apparent possession is contrary to the principle laid down in *Ex parte Jay* (2). He was in apparent possession within the meaning of sect. 7 of the Act of 1854.

Independently of the above considerations the bill of 1873 comes within the Bills of Sale Act of 1882 (45 & 46 Vict. c. 43), and is under that Act absolutely void as between every one, so that no one can take a title under it. That Act was passed in consequence of the decision of the Court of Appeal in *Davis* v. *Goodman* (3), and was intended to apply to all bills of which the registration was not renewed under the previous Acts. The provision in sect. 3 that the Act shall not apply to bills of which the registration has not lapsed, shews that the intention was that it should apply to bills which had lapsed.

Ambrose Q.C. and *C. H. M. Wharton*, for the respondents were not heard.

EARL OF SELBORNE L.C.:—

My Lords, it appears to me that the true point upon which this case depends is that which is clearly enough put in the judgment of the Master of the Rolls, although there is much in that judgment, with reference to the question of possession and apparent ownership, on which, if it were necessary for your Lordships to express an opinion, you might, subject to what you might have heard from the other side, perhaps have hesitated to agree with that learned Judge. But the Master of the Rolls (4) says this: "At the moment when that transaction took place" (that is between Mr. Swire and Mr. Charles Vaughan) "there was no execution creditor in existence. It is the person who has the legal property in the goods selling them by a bonâ fide sale to a person who has a right to buy them and does buy them; and it is an act equivalent to a carrying over by one to the other. I come to the conclusion on that, that the bill of sale was satisfied" (by which I understand the learned Judge to mean spent and at an end, functum officio) "at a time when the Bills of Sale Act did not apply to it; and from that time the Bills of Sale Act never applied to that bill of sale any more, so that the question of apparent ownership with regard to the bill of sale was not one which arose at that time." If that is a correct view, I think there can be no doubt that the judgment of the Court of Appeal is correct, though some other reasons have been assigned for it, as to which, if the case had depended upon them, your Lordships would doubtless have desired to hear the respondents' counsel. And I think that view is correct.

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(1) 7 Q. B. D. 80.

(2) Law Rep. 9 Ch. 697.

(3) 5 C. P. D. 128.

(4) The quotations from the judgments are taken from the printed papers before the House.

Now, the facts necessary to be considered are few. This bill of sale was given upon the 10th of May 1873; and, undoubtedly, according to the law as it stood at that time, under the Acts of 1854 and 1866, it was necessary that the bill of sale should be registered to make it stand against assignees in bankruptcy and execution creditors of the grantor of the bill of sale; and it was also necessary, to keep the registration on foot, that it should be re-registered at the end of five years. In point of fact it was originally registered, but at the end of five years it was not re-registered, and, for the purposes of the present argument, it must be taken as an unregistered bill of sale. Still, it was a bill of sale governed by the Acts of 1854 and 1866; and, for the reasons which I shall presently give, it was not governed, for any purpose material to this case, either by the Act of 1878 or by the Act of 1882.

That being the state of the case, and the bill of sale having been given to secure the payment of a certain sum of money on demand, with a power of sale, in the most ample terms, in the case of non-payment, it appears that a demand was made of the money by the creditor on the 11th of January 1883. And I take it to be clear and unquestionable, that at that time, as between the debtor and the creditor, the bill of sale was in force; though, not being registered, if an execution had before that time been issued, the right of the execution creditor would have prevailed. But, as between the debtor and the creditor, it was in force according to its tenor and with all its provisions. The demand

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was duly made upon the 11th of January 1883; and that demand, being in writing, expressly stated, that if the payment were not made, the holders of the bill of sale (I will call them the mortgagees, for that was the nature of the security) "will proceed to sell your furniture and effects under the powers contained in such bill of sale,"—which, as I have said, were ample powers of sale, and if duly exercised would convey to a purchaser, not the title to the mortgage originally created by the bill of sale, but as full a title to the property as any absolute transfer could give.

The money was not paid, and on the 19th of January the transaction was completed as between the vendors and the purchaser, Mr. Charles Vaughan, in this way: the goods were delivered in a manner which, as between those parties, at all events, I take to have been perfectly sufficient to transfer the possession. A receipt was given for the purchase-money which is in these terms: "Received from Mr. Charles Vaughan the sum of £250, being the purchase-money agreed to be paid by him for the whole of the household furniture and effects." That is signed by the vendor, and on the same day a security for that money, which was accepted in lieu of payment, was given by Mr. Charles Vaughan, as the purchaser and the owner of the goods sold, to Mr. Swire and the other vendors, which security was duly registered according to the requirements of the Acts of Parliament and the Bills of Sale Act, so far as related to that transaction at all events, on the 22nd of January, three days afterwards, at which time there was no bankruptcy and no execution. The execution creditors, who are the appellants here, obtained judgment as against Samuel Vaughan, the grantor of the original bill of sale, on the 25th of January 1883; and execution was immediately afterwards issued; but that was subsequent not only to the completion of such title as Charles Vaughan derived from the sale to him by the persons who had derived title from the original bill of sale of 1873, but also subsequent to the registration of the new security by the new bill of sale which Charles Vaughan, as owner, had given to Messrs. Swire; so that if Charles Vaughan had a title which enabled him to give that security, that security was duly registered, and the execution could not prevail over it.

These are the material facts. Now let us consider the questions of law which have been argued.

And first, I think that it may be well to deal with the question, by what law the case is to be governed. The Acts which were in force when this bill of sale was originally given, were the Acts of 1854 and 1866; and it appears to me to be clear, that the subsequent Acts have no bearing at all upon the case, because the Act of 1878 is by the 3rd section expressly made applicable only,—when I say "only" I mean as to its general provisions, including the important provision of the 8th section, which avoids bills of sale against execution creditors,—it is made applicable, in that sense, only to every bill of sale executed on or after the 1st of January 1879. This bill of sale, as has been said, was executed in 1873. It is not, therefore, a bill of sale to which the Act applies under that clause. And by a later section, the 23rd, this is added, "From and after the commencement of this Act the Bills of Sale Act 1854 and the Bills of Sale Act 1866 shall be repealed; provided that, except as is herein expressly mentioned with respect to construction"—(which is immaterial for this purpose) "and with respect to renewal of registration" (which is also immaterial for this purpose, for this was an unregistered bill and could not then be renewed) "nothing in this Act shall affect any bill of sale executed before the commencement of this Act; and as regards bills of sale so executed the Acts hereby repealed shall continue in force."

The Act of 1878 leaves untouched bills of sale under the former Acts, and leaves them still to be governed by those former Acts except with regard to two matters which for this purpose are immaterial; and the new Bills of Sale Act only applies as to its general provisions to bills of sale executed after the 1st of January 1879, which this was not. That Act therefore, I think, cannot apply in any way to this case.

But then it was contended, that there were words in the 3rd section of the Act of 1882 which made that Act applicable to the present bill of sale, because it had been previously avoided by non-renewal. I think that several answers might be given to that observation. It is no doubt a singular way of making the positive provisions of an Act of Parliament applicable retrospectively to past transactions, if it is alleged to be done merely by negative words which exclude the application of the Act to certain classes of cases within which the matter in question may not happen to come; and when we look at the affirmative provisions of the Act it seems excessively difficult to give them, at all events in such a case as this, any retrospective operation. But I am content for this purpose to lay aside the Act of 1882 upon this simple ground that the 3rd section which contains the words which are relied on says "The Bills of Sale Act 1878 is hereinafter referred to as 'the principal Act,' and this Act shall so far as is consistent with the tenor thereof be construed as one with the principal Act." Then are added the words which are relied upon, "but, unless the context otherwise requires, shall not apply to any bill of sale duly registered before the commencement of this Act so long as the registration thereof is not avoided by non-renewal or otherwise."

Well, it appears to me that whatever the effect of those words "but unless" and what follows, may be, as to bills of sale which are within the principal Act, the registration of which may be avoided by non-renewal, they cannot possibly have the effect of extending the provisions of the Act of 1882 to old bills of sale which are neither by any clear and express words brought retrospectively within the Act of 1882, nor are within the Act of 1878; and I have already shewn that this bill of sale is not within the principal Act, the Act of 1878.

That brings us back purely and simply to the question, what is the effect of the Act of 1854? In that Act there are only two sections which are at all material to be referred to, nay, in my judgment only one, which is the first. Another has been referred to in the argument as perhaps bearing upon the question, viz., the 7th, containing the definition of apparent possession. But what is this first section of the Act of 1854? Read shortly, it is this—that every bill of sale of personal chattels shall as against assignees in bankruptcy, and as against execution creditors, be null and void so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which, at the time of the bankruptcy or of executing the process, as the case may be, and after the expiration of a period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be. It is argued that those words, according to their true and proper meaning, overreach all intermediate transactions whatever, changing the title to the property between the original unregistered bill of sale and the execution, if, at the time of the execution, the property is "in the possession or apparent possession of the person making the bill of sale or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given." The argument is, as I have said, that, at all events, if the goods are in the possession or apparent possession of the person who made the bill of sale, no matter what time may have elapsed, no matter what intermediate transactions may have taken place, bonâ fide or otherwise, no matter what alteration in the title to the goods and chattels may have been effected by those intermediate transactions, still you have only two things to look at, the original bill of sale and the final execution and the state of possession at that time. Apparent possession is defined, but it appears to me that there is nothing in the definition having any other bearing on the language of this clause, than to shew that formal possession is not to exclude the operation of this first section in favour of an execution creditor.

I think it might perhaps be enough to look at the words, "comprised in such bill of sale," and the words, that the bill of sale shall "be null and void." It is impossible that those words can have been meant by the legislature to apply to a case in which the existing title does not depend upon the bill of sale, and in which the goods are not for any present purpose comprised in the bill of sale at all. They have passed out of that condition. They have passed into the hands of a subsequent purchaser who takes a title not dependent upon the continued subsistence or efficacy of the bill of sale; and he takes it at a time when there is no execution and no bankruptcy, in respect of which the title of the person selling to him was liable to be impeached.

It seems to me, therefore, that it is quite impossible to say that a spent transaction of that kind—for that bill of sale is as entirely spent as if it had been null and void to all intents and purposes independently of the Act—can be revived, as it were for the purpose of being destroyed, to let in, as against the true title, a subsequent execution creditor. It is not sufficient to say that the same thing might have happened if it had been an absolute transfer by bill of sale. I assume that it might have been, and I agree that the argument probably would have been the same. If the subsequent transferee in that case, as in this case, leaves the goods in the apparent possession of the person who is the grantor of the original bill of sale, and himself does not register his own title, if his title is by an absolute bill of sale, or if he grants a title to somebody else, whether absolute or conditional, and if that person does not register it, then he, in the one case, and his assignee in the other, will be liable, no doubt, to have his title defeated by a subsequent execution; not because the person to whom the first bill of sale was given has not registered it, but because the person who has got the second bill of sale has not registered it, and leaves it in a position of danger. I do not think, therefore, that that varies the matter in any degree whatever; but I do think that, as against the true owner, you must find in the Acts something which takes away his right. Now there is nothing in these Acts which gives to any execution creditor any right to seize property because it is in the apparent possession of his debtor though it does not really belong to him, unless the title of the true owner depends upon a bill of sale not registered. All the other conditions of apparent possession and an ownership different from that of the apparent owner may exist; but there is nothing whatever, in this Act of Parliament at all events, which gives an execution creditor the right on that account to take property which does not belong to his debtor. If, therefore, the right is claimed, it can only be claimed upon the strict conditions of this Act; and it must be because, at the time when the execution takes place, there is a bill of sale governing the title to that particular property, in which, in that sense, the goods in question are comprised; and because, if that bill of sale were at that moment null and void, the title would be destroyed by its nullification. But that is not the state of the case here. Here the title had passed away from the bill of sale altogether. There had been an out and out sale, bonâ fide, as the jury found, to an absolute owner who held, not by virtue of that bill of sale at all, but by virtue of a sale which had been made to him; and then he, uno flatu, makes an assignment to another person and that other person has duly registered the bill of sale under which he claims.

I think, under these circumstances, that the judgment appealed from is right, and ought to be affirmed.

LORD BLACKBURN:—

My Lords, I am of the same opinion.

I think that in the judgment of Cave J. there is only one point, (but that is a very important point) on which I am inclined to differ from him. The Court of Appeal indicate what in my mind is the true ground upon which Cave J. was wrong; but they also indicate a good many other things upon which, as the Lord Chancellor has said, if it were necessary to decide upon them I should certainly at least require to hear the other side in support of them. I need not say more than that. It all turns in my mind upon the construction of a few words in an Act of Parliament, but I will first of all point out, what I think is the real object of these Acts of Parliament, before coming to the interpretation of the words.

At common law a man might take a security upon goods without carrying away the goods or taking possession of them—he might take a sale of them out and out, and he might take the legal property in them subject to the power to redeem them (what is commonly called a mortgage), without taking possession of them. The law on the subject will be found in *Twyne's Case* (1) and the notes upon *Twyne's Case* (1), but this rule got established that when the goods were not taken away, but were left in the hands of the man who had had them previously, that which had been thought before to make the transaction void was really no more than evidence to go to the jury of fraud; and if a man came forward suddenly, when there was an execution,

(1) 3 Rep. 80; 1 Sm. L. C. 8th Ed. 1.

for instance, issued against the person in possession of the goods, and said, at an antecedent time I had a security upon these goods, and I left them in the possession of the debtor all that time, the not having taken possession was evidence that the thing was a sham;—it was not conclusive; it was not a matter of law, but it was evidence that the thing was a sham. Upon that two evils arose, and very important ones they were. In the first place it often happened that there was really a sham put up to endeavour to defeat a man, and there was a great quantity of perjury, of fighting and expense, before it was proved to be a sham. That was a great evil. The other was that there were real honest transactions which were asserted to be shams when they were not, and in those cases there was apt to be much perjury and great expense before it was decided. For those reasons it was thought, and reasonably and properly so, that it was desirable to put a stop to this.

That was the beginning of the series of Bills of Sale Acts, the first of which was passed in 1854, and said this: Where there is a bill of sale, or where there is a written agreement in which it appears that you have got a security, or even I suppose a transfer of the whole property, at all events that you have got a security,—a bill of sale,—that shall within a short time be registered, and two things are to follow from it. In the first place its being registered will put an end to any fear that any one should start forward afterwards and say, The transaction being kept secret is a proof that it was a sham transaction, for, it being actually registered as bills of sales are required to be, it could no longer be secret, and there would be no badge of fraud in that respect. The other was, if it be not registered, then so long as the goods are in the apparent possession of the person to whom they originally belonged, so long it shall be void as against a certain class of persons, namely, execution creditors, and various other persons that were named. The only thing that I would say at the outset upon this with regard to the 1st section is, that the first Bills of Sale Act applied, not only to sales and transfers by the grantor, (the man who had the goods) by way of security and otherwise, but also to transfers by the sheriff, when he had seized those goods. Nobody for a moment would suppose that it was a possible thing when the sheriff had seized the goods and sold them, that the sheriff should make out a bill of sale, and that the sheriff should keep possession—that was out of the question. But it was thought, and indeed it was found by experience, that a very common mode in which a sham actually took place, when there was an execution, was this—that the execution debtor bought back his own goods, getting a man of straw to come forward and pretend this,—It is I who have bought them from the sheriff, and although I have lent money to you, and you have given me security, and I let you have the goods, still it is I who buy them from the sheriff. Consequently the Act of Parliament very judiciously said bills of sale shall be registered as well when they are given by the man himself, as when the sheriff has taken them in execution from him. Nothing of that sort applies here, nothing arises here about it, for no sheriff had anything to do with this matter.

Now, coming to apply this Act to the present case, we find that in 1873 the Reverend Samuel Vaughan was in debt. Mr. Swire, who seems to have been his brother-in-law and also trustee, I suppose, for Mrs. Vaughan, agreed to advance money to pay off that debt, and for that purpose,—it was a very proper thing to do,—he said I will take the goods from you, I will take a security if you like upon all those goods, and if you pay off that security, well and good, if not, it is evident that the intention of Mr. Swire was, that these goods should be a security to him for the money which he had advanced, whether out of his own pocket, or as trustee for his sister we really do not know, and it is not material—he intended that these goods should be a security for that advance, and it was obviously the intention that they should remain in the Rev. Samuel Vaughan's house and be used by the Rev. Samuel Vaughan and his family—in fact, be to all intents and purposes in the apparent ownership of the Rev. Samuel Vaughan. That bill of sale, as was necessary under the Bills of Sale Act which then existed (this was in 1873), was registered, and it would therefore at the end of five years require to be re-registered or otherwise it would have the same effect as if it had never been registered, and would consequently be void as against the class of persons who were named in the Acts existing at that time. I do not know that it is very material to say anything further about it than that.

This security which was taken by Mr. Swire in 1873 contained at the end a provision that if Mr. Vaughan did not pay the money owed when a demand had been made in writing then it should be in the power of Mr. Swire or his assigns to sell the goods absolutely by private bargain.

Now it happened that at the time when this transaction took place it became known to people that there was a creditor who was likely to come upon the Rev. Samuel Vaughan and to seize his goods, or rather not his goods but the goods which were in his apparent possession as it was said; and people also became aware that owing to the neglect to re-register the bill of sale, inasmuch as the term of five years had elapsed in 1878, that bill had become an unregistered bill and was consequently void as against those against whom unregistered bills of sale were made void, though not, under the law as it then stood, void as against anybody else. That being so there is no doubt in my mind that formal notice to Mr. Vaughan to pay off the money was given in order that Mr. Swire should be in a position legally to sell the goods. I have no doubt whatever that that was done for the very purpose and object that by selling those goods they should be able to defeat the creditor who would come against the Rev. Samuel Vaughan and would seize those goods which really and truly belonged to Mr. Swire—at least for all substantial purposes they belonged to him, because I suppose they were mortgaged to their full value—but which had been left as I have described in the possession of the Rev. Samuel Vaughan. There is nothing whatever illegal, there is nothing immoral, there is nothing improper in that. It is conceded that it would have been perfectly good, when that notice had been given, if Mr. Swire, acting in his own interest, had come with porters and taken the goods and carried them out of the house, although that had been done only two minutes before the sheriff's officer had turned the corner of the street to come and seize them all. I make no doubt that it was entirely with that object that the transaction took place with Charles Vaughan, the son of the Rev. Samuel Vaughan, who I dare say had not much money of his own,—probably no immediate money,—and Mr. Swire, advised I suppose by lawyers that this was the best course to pursue, said, I will sell them to you, Charles, as soon as I have got the right to do it. You cannot pay me I know, you have not got the money, but I will lend you the money. I agree to sell the goods to you and transfer the goods to you, and when they are transferred to you I will lend you the money if you will then give me a new bill of sale upon the goods so as to make them a security for the money I lend you. I have no doubt that that which was done in that way was intended to be done for the very purpose of defeating an execution, and of keeping these goods unsold for the benefit of the dying father and the mother and the children. It would have been very wrong and very improper to *pretend* to do all this no doubt, but so far from its being wrong or improper to do it I think it was, as I say, highly moral and right. The question as to whether or no it was a sham, the question whether or no there was really a bonâ fide transaction to the effect which I have described, was left to the jury, and their finding is unimpeached.

Then comes the question of law. Now, says Cave J., "they prove an agreement between Charles Vaughan and Mr. Swire by which the property in the goods was transferred from Mr. Swire to Charles Vaughan. Now that has been found by the jury to be a bonâ fide agreement, and consequently the effect of that is to give to Charles Vaughan the title which Swire had." Now, had that been so, as at present advised, I should say, subject to what might be said by the other side, if it was necessary to hear them, that there was an apparent ownership in Samuel Vaughan at that time, and I should have said that if Mr. Swire had agreed to transfer the property from himself to Charles Vaughan, Charles Vaughan would be in the same position and no better than Mr. Swire. But instead of thinking that it was an agreement to do that, I think it was intended to be, and was, an agreement not that Mr. Swire would transfer his own right, after having given the due notice by which he was enabled either, as I said before, to come with porters and carry away the goods and so put an end to the matter, or to sell the property out and out of the

Rev. Samuel Vaughan in those goods,—it was not an agreement that he would transfer his own right but that he would transfer the absolute property in the goods. What Mr. Swire had was the goods subject to an equity of redemption—what he conferred upon Charles Vaughan was very likely not of more value, but it was a different thing. It was the property in the goods without any equity of redemption, and if the transaction was a bonâ fide one (and I do not myself see the slightest ground, when it has been explained as I have explained it, for saying it was not perfectly bonâ fide), I do not see how it comes within the earlier Act. The earlier Act makes that void as against the holder of a bill of sale and his assigns, and those who claim under him, but it does not make it void as against those who become entitled to the goods by virtue of his exercising the power before ever the person's claim came into existence who had the right to say that the bill of sale was void, and that was not until the time of the execution, when the sheriff's officer came in, in the present case.

It seems to me therefore that upon that point Cave J. made a mistake—was under a misapprehension. Upon the rest I should be inclined to agree with him. We have not heard the counsel for the respondents, and it may be that on some of the other points the Court of Appeal may be right. I will not say that they are not, but upon that ground I think that this was not a case in which under the Acts which had been passed down to 1878 (I do not go further than that), it would have been void as against anyone else. It is said that the Act of 1882 has the effect of making it void absolutely, or to a greater extent. Whatever effect that Act may have on future bills of sale, as far as the present case is concerned, for reasons which I do not repeat as they have been stated by the Lord Chancellor, and which are satisfactory to my mind, I think that it was not intended to be retrospective so as to bring it into operation in the present case.

For these reasons I agree in the judgment which has been proposed.

LORD WATSON:—

My Lords, I concur and I have nothing to add.

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LORD FITZGERALD:—

My Lords, I agree with the judgment which the Lord Chancellor has announced, and I have nothing to add.

Order appealed from affirmed; appeal dismissed with costs.

Lords' Journals 23rd May 1884.

Solicitors for appellants: *Johnson & Weatherall, for Storer & Lloyd, Manchester.*

Solicitors for respondents: *Pritchard, Englefield, & Co., for Southam & Harwood, Manchester.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1884
Aug. 1.

THOMSON . . . . APPELLANT;

AND

WEEMS AND OTHERS . . . . RESPONDENTS.

Life Assurance—Truth of Answers to Queries of Life Insurance Company—Express Warranty—"Strictly Temperate"—Matter of Fact and Matter of Opinion.

A. applied to an insurance office to effect a policy on his life. He received a printed form of proposal containing questions. Among these was the following: "Question 7 (*a*) Are you temperate in your habits? (*b*) and have you always been strictly so? A answered (*a*) "Temperate;" (*b*) "Yes." Subjoined to the printed questions was a declaration, which A. signed, to the effect that the foregoing statements were true, and that the assured agreed that this declaration should be the basis of the contract, and that if any untrue averment, &c., was made the policy was to be absolutely void and all moneys received as premium forfeited. The policy recited the above declaration as the basis of the contract. After A.'s decease the insurance company refused payment of the policy on the ground that the above-mentioned answer was false in fact. In an action on the policy:—

Held, reversing the decision of the Court below, that the declaration of A., taken in connection with the policy, constituted an express warranty that the answer to Question 7 was true in fact; and as the evidence clearly proved that A.'s averment as to his temperance was untrue, the policy was absolutely null and void.

Life Association of Scotland v. *Foster* (11 Court Sess. Cas. 3rd Series, 351) distinguished.

Hutchison v. *National Loan Assurance Company* (7 Court Sess. Cas. 2nd Series, 467) not approved of.

APPEAL from the Second Division of the Court of Session, Scotland.

The question was whether Spencer Thomson, the appellant, as manager of and as representing the Standard Life Assurance Company of Scotland, was bound to pay to J. & W. Weems and others, the respondents, the sum of £1500 contained in a policy of assurance on the life of the late William Weems. The policy and the evidence is given fully by Lord Blackburn in his opinion,

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and therefore it is here necessary only to state shortly that the appellant now resists payment on the ground that the answer to Question 7 in the declaration made by Mr. Weems at the time the contract of assurance was entered into was false, and that the policy was consequently void. He had before the Lord Ordinary insisted that other answers made by Mr. Weems were also untrue, but before the Second Division and this House he confined his defence to Question 7. That question was (1.) "Are you temperate in your habits?" (2.) "and have you always been strictly so?" The answer was "(1.) Temperate; (2.) Yes."

The policy, with another, had been effected by Mr. William Weems himself, but for purposes connected with the financial arrangements of the firm of J. & W. Weems: and this action was raised by them and another person to whom the policy had been assigned for an advance. The policy was executed on the 25th of November, 1881, and Mr. William Weems died on the 29th of July, 1882.

The appellant, Thomson, averred (3) "the statements made as above recited by the said William Weems were at the time of their being made and to his knowledge false. In point of fact the said William Weems was at that time a person of intemperate habits, and he had been so for some time. His health was affected by his said habits. His death, which occurred shortly after, was the result of them. (4) The false answers above set forth were made knowingly and fraudulently by the said William Weems in order to conceal the risks attaching to an assurance on his life from the company and to induce them to grant him a policy, which they would not have done had they been aware of the true state of the facts.

The respondents averred (cond. 4), with reference to the statement of facts for the defender it is denied that the answers made by Mr. Weems to the questions there enumerated were false, or at least that they were made by him in the knowledge that they were false, and with a fraudulent intention.

The material pleas in law for the appellant were (1) the statements, or some of them, in the said declaration having been untrue, the policy is void in terms of the stipulation therein

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contained; (2) the said William Weems having concealed circumstances material to the risk to be undertaken by the proposed assurers the said policy is void and cannot receive effect; (3) the said William Weems having falsely and fraudulently misrepresented facts connected with the proposed assurance the policy is void.

The Lord Ordinary (1), 13th of November, 1883, found, inter alia, "that the said William Weems did not make any untrue statements in the said declaration, and that therefore the policy is not void; therefore decerns against the defender" (appellant) as concluded for in the summons.

The appellant having reclaimed, on the 5th of March, 1884, the Second Division of the Court of Session (Lord Rutherfurd Clark dissenting) pronounced an interlocutor adhering to the Lord Ordinary's decision (2).

On appeal,

July 7, 14, 15. *The Solicitor-General for Scotland* (*Asher* Q.C.), and *Webster*, Q.C., contended that the decision of the Court below was erroneous. The word "temperate" must be construed according to the ordinary meaning attached to the word by an ordinary reasonable person without regard to the place of residence of the assured; but even taking the town of Johnstone, where he lived, the people there could not be said to be given to intemperance. The evidence shewed that Mr. Weems was not in the ordinary sense of the word "temperate"; and more than that, he had had warnings and expostulation on the subject, which made it impossible for him to honestly consider himself a person of "temperate" habits.

Then if the fact of intemperance be proved, in order to avoid the policy of assurance under the conditions here made the basis of the contract, it was unnecessary for the assurer to prove that the answer of the assured was false to his knowledge, or belief. It was enough if the answer was in reality false in fact: Lord Lyndhurst in *Duckett* v. *Williams* (3). And the opinion of all the judges (Baron Parke (1), Lord Cranworth (2), Lord St. Leonards (3), and Lord Brougham (4)) in *Anderson* v. *Fitzgerald* (5), was that the sole point for decision was whether the answer to the question was true or false, and that whether the assured knew it to be true or false is utterly immaterial. See also Cockburn, C.J., in *Macdonald* v. *Law Union Insurance Company* (6), and *Geach* v. *Ingall* (7). In *London Assurance* v. *Mansel* (8), it was held that there being a material concealment the office was entitled to rescind the contract. And in *Cazenove and Others* v. *British Equitable Assurance Company* (9), though the jury found that no material information had been withheld, and no intentional fraud was imputed, yet the policy was held void because a "personal statement" by the assured contained untrue answers to queries. *Life Association of Scotland* v. *Foster* (10) would be cited against the appellant, but it was distinctly different. In that case the assurers contended that the policy was void because the assured had rupture at the time of effecting the assurance, and because in the declaration and relative papers which formed the contract between the parties she stated that she "was in good health, not being afflicted with any disorder, external or internal," and had, in her reply to the question "have you had rupture?" &c. put by the medical officer of the assurance company, answered "No." She had rupture unknown to herself at the time and died of it, but it was held, that the warranty of the assured of the truth of her statements in regard to her health was not a warranty that she had no disease, known or unknown, but merely that, so far as within her own knowledge, she had none. In *Scottish Equitable Assurance Company* v. *Buist* (11), the assured said he had had no ailment and he was proved to have had several. The Court of Session held that the policy was void. The case came to this House on appeal but was withdrawn, the counsel for the appellant Buist considering it to be governed by *Anderson* v. *Fitzgerald* (1). No doubt *Wheelton* v. *Hardistry* (2) seemed against the appellant, but there it was held that the statement had not been imported into the policy with sufficient distinctness to make it the basis of the contract. So also in *Fowkes* v. *Manchester and London Life Assurance Association* (3), it was held that the policy and declaration must be read together, and so reading them, the policy was not avoided by any untrue statement in the declaration, unless designedly untrue. But here from the construction of the contract, it was clearly shewn that the basis of the contract was that the answer to the question—was he temperate and had he always been strictly so, was true in fact. They submitted it was untrue, and therefore, without regard to the belief or the knowledge of the assured—the person who made the answer—the policy was absolutely void.

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(1) Lord Fraser.

(2) 11 Court Sess. Cas. 4th Series, 658.

(3) 1834: 2 C. & M. 348.

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(1) 4 H. L. C. 484, at p. 498.

(2) Ibid. at p. 503.

(3) Ibid. at pp. 509, 514.

(4) Ibid. at p. 506.

(5) July 14, 1853: 4 H. L. C. 484.

(6) April 20, 1874: Law Rep. 9 Q. B. 328, at p. 331.

(7) May 3, 1845: 14 M. & W. 95.

(8) March 1, 1879: 11 Ch. D. 363.

(9) May 6, 1859: 6 C. B. (N.S.) 437.

(10) Jan. 31, 1873: 11 Court Sess. Cas. 3rd Series, 351.

(11) July 13, 1877: 4 Court Sess. Cas. 4th Series, 1076.

The Lord Advocate (*Balfour*, Q.C.), and *James Reid*, for the respondents, maintained :—

There was in this declaration questions of different species—questions of pure fact as to which no man could be in doubt, such as, "had his life been previously insured;" and questions as to facts the truth of which could not be known by any cognisance. They submitted that the true construction of such a contract was this: that where a general declaration attached to a number of items, declared their truth to be the basis of the contract, some of which items referring to pure fact, and others to questions of fact which were in reality questions of judgment, when applying the word "untrue" to the items of pure fact *Macdonald's Case* (4) applied, and their untruth vitiated the contract. But when applying the declaration of the truth of the answer to an opinion or judgment *Foster's Case* (5) applied, and if the assured truly answered the question according to his bonâ fide belief, then, though untrue in fact, that did not annul the contract. Now here Question 7: Are you habitually temperate, and have you always been so? was a question addressed to the judgment or opinion of the assured. It must be his opinion and not the opinion of the people living in the same town: and if the assured made a mistake, the reasoning of *Foster's Case* (1) applied and not that of the English cases. *Duckett* v. *Williams* (2) was a re-insurance case; and in *Anderson* v. *Fitzgerald* (3) the sole point for decision was the materiality of the answers. There also the matters represented were untrue in fact to the knowledge of the assured; in *Hutchison* v. *National Loan Assurance Company* (4) the proposal and relative declaration made the basis of the contract stated that the party had no disease or symptom of disease. The assured died of a disease she must then have had. It was held that the declaration imported a warranty only to the effect that the declarant was, according to her own knowledge and reasonable belief, free from any disease, and did not import a warranty against any latent imperceptible disease that could only be discovered by post-mortem examination. There Lord *Fullerton* held *Duckett* v. *Williams* (2) did not apply, and remarked "The statement in the declaration here was, in its sound construction, true, if the party making the declaration never had any consciousness of ailment." See also *M'Laws* v. *United Kingdom Temperance Institution* (5). *Life Association of Scotland* v. *Foster* (6) went to this: that where you ask a person without medical knowledge if he has a latent disease, though there is an outward and visible sign of rupture, and he answers "No," that will not void the policy for you are asking him as to his knowledge and belief and not for a warranty; so here, though temperance or intemperance is an external fact and not latent, when the assured was asked "Are you temperate?" he was called upon to pass a reasonably honest and intelligent judgment on himself; and all he warranted was the honesty of his belief. *Scottish Equitable Life Assurance Society* v. *Buist* (7) came to this House (8) and was abandoned at the Bar, not on the points here, but because the answers as to facts within the knowledge of the assured were fraudulently false. But there Lord *Young* said :—" A policy ought not to be easily set aside upon a comparison of the result of what I have characterised as a post-mortem inquiry into a man's habits and bodily ailments, and the answers which he has given to the queries answered in his proposal for insurance." " With respect to sober and temperate habits, in particular, I should certainly not be induced to hold an answer false, by evidence of habitual generous living or even of occasional excess."

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(1) July 14, 1853: 4 H. L. C. 484.

(2) 1857: 8 E. & B. 232.

(3) May 1, 1863: 3 B. & S. 917.

(4) Law Rep. 9 Q. B. 328.

(5) 11 Court Sess. Cas. 3rd Series, 351.

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(1) 11 Court Sess. Cas. 3rd Series, 351.

(2) 1834: 2 C. & M. 348.

(3) July 14, 1853: 4 H. L. C. 484.

(4) Feb. 21, 1845: 7 Court Sess. Cas. 2nd Series, 467, at p. 480.

(5) 16 Feb. 1861: 23 Court Sess. Cas. 2nd Series, 559, at p. 560 (note).

(6) Jan. 31, 1873: 11 Court Sess. Cas. 3rd Series, 351.

(7) July 13, 1877: 4 Court Sess. Cas. 4th Series, 1076.

(8) 5 Court Sess. Cas. (H.L.) 4th Series, 64.

On the facts proved, they submitted that, according to the opinion of a reasonable man, the assured here was temperate in his habits.

[*Scanlan* v. *Sceals* (1) was mentioned by Lord *FitzGerald.*]

The Solicitor-General for Scotland in reply.

The House took time to consider.

1884. Aug. 1. Lord Blackburn :—

The respondents, in this case the pursuers, sought to recover from the Standard Life Assurance Company, who are represented by the appellant, £1500, the amount of a policy on the life of William Weems.

The policy, on the true construction of which much depends, was executed on the 25th of November, 1881. It commences by reciting that William Weems " having subscribed or caused to be subscribed and deposited at the office of the said company in Edinburgh a declaration, bearing date the 9th of November, 1881, which *is hereby declared to be the basis of this assurance*, and having paid £55 17*s.* 6*d.* as the premium for such assurance for one year from the 15th of November, 1881," then follows the operative part of the policy for one year, with a stipulation that it may be continued from year to year on the payment, on or before the 15th of November, of the same premium,—as the life dropped before 15th of November, 1882, this never came into operation,—and two provisoes,—

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(1) 5 Ir. L. Rep. (1843) 139; 6 Ir. L. Rep. (1844) 367.

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"Provided always that the assurance hereby made shall at all times and under all circumstances be subject to the terms and conditions printed on the back of this policy, which terms are to be considered as incorporated in and forming part of this policy."

There is no averment as to what these terms and conditions are, and no question is raised as to the effect of this proviso.

But the next proviso is important,—

"Provided also, that if anything averred in the declaration hereinbefore referred to shall be untrue, this policy shall be void, and all monies received by the said company in respect thereof shall belong to the said company for their own benefit."

The declaration referred to is in a printed form, partly filled up by William Weems, and I think it convenient to read the document as it is instead of attempting to abridge it.

"The person whose life is proposed for assurance will also answer the following questions:

	Age, if Living.	Age, if Dead.	Cause of Death.
1. Are your parents alive, and what are their respective ages? If dead, at what ages, and of what diseases, did they die?	Father, dead. Mother, 65.	76	Exhausted nature.

	Original Number.	No. Dead, and Ages.	Causes of Death.	Ages of Survivors.
2. What was the original number of your brothers and sisters? How many of them are dead, and at what ages, and of what diseases, did they die? and what are the ages of the survivors?	Brothers, 1. Sisters, 2.	16	Accidents	

Are any of your immediate family at present in a delicate state of health?	No.
3. Have any of your near relations been afflicted with consumption or other disease of the chest?	Never.
4. (1) What is the present and general state of your health? and (2) do you consider yourself of a sound constitution?	(1) Good. (2) Very much so.

5. For what disease or diseases, since those of childhood, have you required medical assistance? State also when and where you required such advice?	None.
6. Are your habits active or sedentary?	Active.
7. (1) Are you temperate in your habits? (2) and have you always been strictly so?	(1) Temperate. (2) Yes.
8. What is your trade, profession, or occupation, and how long have you followed it? Have you always been of the same trade, profession, or occupation? If not, state how you have been engaged? . . .	Engineer since boyhood.
9. Have you ever resided beyond the limits of Europe? and if so, where, and how long? and did your health suffer?	No.
10. Have you now, or have you ever had, any intention of proceeding beyond the limits of Europe? . .	No.
11. State any circumstances which may call you beyond the limits of Europe, and, particularly, whether you have business relations or interest in friends abroad which might do so	None.
12. State any other circumstances connected with health, habits, occupation, family history, or otherwise, which ought to be communicated, in order to enable the Company to judge fairly of the risk of an assurance on your life	None I know of.
13. (1) Has your life ever before been proposed for assurance to this or any other office or offices? . . .	(1) No.
(2) Has it ever been declined, or withdrawn, or accepted at an extra premium?	(2) No.
14. Name and residence of ordinary medical attendant, and how long known to him, for reference as to present and general health and habits	Known to him years.

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Name any other medical gentleman whose advice has been sought, and state for what complaints, and when, his services were required . (If you have received no medical advice, you will state so.)	No medical advice.
15. Name and residence of an intimate friend, not being a relative, nor interested in the assurance, and how long known to him, for the purpose of reference . . . . . (When the party has not required medical advice, it will be necessary to name two intimate friends.)	James Wm. Erskine, Johnstone. Known to him from boyhood. Alex. Wylie, engineer, Johnstone.

"I, the said William Weems (the person whose life is proposed to be assured), do hereby declare that I am at present in good health, not being afflicted with any disease or disorder tending to shorten life; that the foregoing statements of my age, health, and other particulars are true; that I have answered truly the above questions as to any prospect or intention I may have of proceeding or residing beyond the limits of Europe; that I have concealed no circumstance connected with the probability of my proceeding beyond such limits at any future period; and that I have not withheld any circumstance tending to render an assurance of my life more than usually hazardous. And I, the said William Weems (the person in whose favour the assurance is to be granted), do hereby agree that this declaration shall be the basis of the contract between me and the Standard Life Assurance Company; and that if any untrue averment has been made, or any information necessary to be made known to the Company has been withheld, all sums which shall have been paid to the said Company upon account of the assurance made in consequence thereof shall be forfeited, and the assurance be absolutely null and void.

"Signed at Johnstone, this ninth day of November, in the year of our Lord one thousand eight hundred and eighty-one.

"(Signature of person whose life is proposed to be assured)

"WILLIAM WEEMS.

"Signature of person in whose favour policy is to be granted)

"Agency—Johnstone & Lochwinnoch."

There was no dispute that William Weems died on the 29th of July, 1882. No case was set up of fraud, but there was a defence set up that there was an untrue averment in the declaration, inasmuch as William Weems had made a statement in answering the seventh of those questions, which was "untrue." No other statement was relied on before the Second Division or in this House.

The case came on before the Lord Ordinary, who, in his note to the interlocutor, says, I think very truly, "There is a great deal of evidence on both sides, and it is very difficult to strike the balance."

He pronounced an interlocutor, finding that the said William Weems did not make any untrue statement in the said declaration.

The Second Division, by a majority, adhered to this, and the appeal is against these interlocutors.

Your Lordships have before you all the evidence on which the Lord Ordinary acted. He had the great advantage of seeing the witnesses, and so far as anything turns on their demeanour, I would not lightly disregard the opinion of the judge who tried the cause. He says in his note that all the witnesses appeared to him equally reliable, with the exception of Dr. Taylor and the two Edwards. As far as regards George Edwards, he says that witness did not impress the Lord Ordinary favourably, and as that is a matter on what he had much better means of judging than your Lordships have, I think that much reliance ought not to be placed by your Lordships on George Edwards. The Lord Ordinary's reasons for distrusting Dr. Taylor and Thomas Edwards are such that your Lordships can form an opinion on them. And I take it that what your Lordships have to do is to determine on the whole evidence whether the statement was or was not "untrue," within the meaning of that word, as used in the policy, and declaration incorporated in it. I think that to a great degree depends on the construction of the whole contract.

Those whose business it is to insure lives calculate on the average rate of mortality, and charge a premium which on that ordinary average will prevent their being losers. There are some expressions used by the judges in the Court of Session in the case of *Hutchison* (1), which would seem to lay it down, at least when it is the party's own life that is assured, that it is illegal, or at least so absurd that no one would make such a contract, to engage that if the life is such that the risk is of the ordinary kind, the insurer shall be bound, but that if there is a disease tending to shorten life, such as to make it not the ordinary risk, the insurer shall not be bound, whether the assured

(1) Feb. 21, 1845: 7 Court Sess. Cas. 2nd Series, at p. 473.

knew it or not. I cannot agree to this; it seems to me a very reasonable stipulation on the party of the insurer, and that it is not at all absurd or improper on the part of the assured to assent to such being a term of the contract. It is seldom that a derangement of one important function can have gone so far as to amount to disease without some symptoms having developed themselves, but the insurers have a right if they please to take a warranty against such disease, whether latent or not, and it has very long been the course of business to insert a warranty to that effect.

If there was no more than a warranty to that effect, if it was disproved, the risk would never have attached, the premiums therefore would never have become due, and might, if paid, be recovered back as money paid without consideration. But it became usual, I do not know when, but at least for the last fifty years, to insert a term in the contract, that if the statements were untrue the premiums should be forfeited.

That, no doubt, is a hard bargain for the assured if he has innocently warranted what was not accurate, but if he has warranted it, "untruth," without any moral guilt, avoids the insurance; and in *Duckett* v. *Williams* (1), in 1834, it was held, on reasoning to my mind irresistible, that in a declaration substantially as far as regards this point the same as this, what was untrue so as to have the effect of avoiding the insurance was also untrue so as to cause the forfeiture of the premium.

In *Anderson* v. *Fitzgerald* (2) Lord St. Leonards points out very strongly that where such a consequence would follow from a warranty, before a contract is held to have the effect of a warranty it is necessary to see that the language is such as to shew that the assured as well as the insurer meant it, and that the language in the policy being that of the insurers, if there is any ambiguity, it must be construed most strongly against them. But he never questioned that if it was a warranty and it was not fulfilled, it avoided the policy. And with the exception of *Hutchison's Case* (3), to which I have already referred, I think that in every case in which moral guilt was thought an element in the question of true or untrue, it has always been on the ground that the contract was such as *not* sufficiently to shew that there was an agreement on the part of the assured that there should be a warranty.

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(1) 2 C. & M. 348.

(2) 4 H. L. C. at p. 507.

(3) Feb. 21, 1845: 7 Court Sess. Cas. 2nd Series, 467.

In *Foster's Case* (1) I think there was very strong ground for saying that it was not shewn that the assured contracted that her answers to a medical man selected by the company, who was to examine her alone and report to them confidentially the conclusion to which he came, were warranted to be accurate; the very object of the examination would be frustrated if the patient was not to answer frankly and without reserve to the questions she was asked. There are other grounds for holding that there was in that case no warranty stated in the judgment of the Lord President, which I think very sufficient, but which have no bearing on the present contract.

Lord Young, as Lord Ordinary, has in his note, in *Buist's Case* (2), said that the misstatement, "if not wilful, it must be inexcusable in this sense, that it consists in a blameably reckless or careless assertion or omission, of which an honest man, giving ordinary attention to the matter in hand, would not have been guilty," and he says in the present case that he still entertains the opinion he then expressed.

My Lords, I do not think any one would question that when the proof goes so far the policy is void, but it seems to me that to hold that it is *necessary* to go so far is, in effect, to say it is not a warranty at all. And whether in any case it is necessary to go so far depends, as I think, on whether there is or is not a warranty in that case.

This, in my opinion, depends on the construction of the whole instrument. It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had

(1) Jan. 31, 1873: 11 Court Sess. Cas. 3rd Series, 351.

(2) July 13, 1877: 4 Court Sess. Cas. 4th Series, 1076.

not thought it material, and they have a right to determine for themselves what they shall deem material.

In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and, *primâ facie*, at least that the compliance with that warranty is a condition precedent to the attaching of the risk. I think that on the balance of authority the general principles of insurance law apply to all insurances, whether marine, life, or fire; see per Lord Eldon, C., in a Scotch appeal on a fire insurance (1). No question arises on that in the present case, but I do not think that this rule as to the construction of marine policies is also applicable to the construction of life policies. But I think when we look at the terms of this contract, and see that it is expressly said in the policy, as well as in the declaration itself, that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars (which, I think, include his statement that he was of temperate habits) is warranted.

The Lord Advocate argued very powerfully that the truth of that statement involved questions of degree and of opinion, and therefore could not, he argued, be warranted. But the most familiar instance of a warranty (implied in every voyage policy) is that of seaworthiness, involving in it questions of degree and opinion to quite as great an extent as a warranty of temperate habits. I think, therefore, whilst I agree that the burthen is on the insurers, and that they must prove drinking carried on before the date of the declaration, 9th of November, 1881, to such an extent as to amount to intemperance, and so often and continuously as to amount to habits of intemperance, they are not obliged to prove anything more.

The object of the insurance company was to know that the life to be insured was not merely not rendered already diseased by drinking, but that his habits were so temperate that there was no unusual risk that he should become a drunkard, and they took

(1) *Newcastle Fire Insurance Co.* v. *Macmorran & Co*, July 10, 1815, 3 Dow. at p. 262.

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the warranty that they might safely dispense with any further inquiry on that point. I think, therefore, that, such being the object of warranty, we must take into account the normal habits of people in the class and in the locality where the person assured lives. I think gentlemen in the last century drank habitually a great deal more than they do now, and I do not think a gentleman then would properly have been held to be of intemperate habits (within the meaning of such a policy) though he drank so much habitually that, if a gentleman now did so, the insurers would reasonably dread that he would drink more; and then he would not be held of temperate habits within the meaning of such a policy. And I think it is fair, so far as the evidence enables us, to take into account the normal habits of the town councillors of Johnstone; the evidence does not satisfy me that they, as a general rule, drank as freely as the assured did. He, some months after the policy was made, was elected provost, and then he seems to have pulled up. That, as it was after the declaration, is only material as far as it throws light on what had been the case before. And, on the 29th of July, 1882, eight months after the policy was granted, he died. Now the cause of death was, in one sense, immaterial. If the policy was avoided, the insurance company would not have been liable though he had been killed in a railway accident, but that would have afforded no evidence as to the state of his habits. But the doctor who attended him in his last illness certified that the cause of his death was hepatitis, chronic, four months, congestion of the brain, four days. Dr. Colligan, who certified this, is himself dead; that, according to the Scotch law of evidence, takes his statements out of the rule as to hearsay evidence, though, in weighing them, we must remember that he is not subject to cross-examination.

Now chronic hepatitis is a disease of the liver, which is generally, in this climate, produced by excessive drinking over a considerable period; and if it is established that the assured had, as early as March, 1882, really began to suffer from such a disease, it adds greatly to the force of that evidence which tends to shew he had been in the habit of drinking too much for some time before November, 1881. I do not know that either class of evidence by itself would have in my mind satisfied the burthen

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which was on the appellant; taken together they do. I must, therefore, advise your Lordships to reverse the interlocutors complained of, with costs.

Lord Watson :—

This appeal raises two questions of some importance: the one of law, the other of fact. The first of these involves the construction of a policy of assurance, bearing date the 25th of November, 1881, effected by the deceased, William Weems, upon his own life, with the Standard Company, which is represented in this action by the appellant.

On the 9th of November, 1881, the deceased submitted a proposal to the company, which was made the basis of the contract of assurance. The seventh question in the proposal was in these terms: "(1.) Are you temperate in your habits? (2.) and have you always been strictly so?" and the reply made to it by the deceased was, "(1.) Temperate; (2.) Yes." It was set forth in the proposal, and it was also made a condition of the policy that in the event of the foregoing or any other averments made by the assured in his proposal concerning his age, health, and other particulars proving to be untrue, the policy was to become null and void, and all sums paid by the assured were to be forfeited.

Mr. Weems died on the 29th of July, 1882, and the Standard Company declined to pay the sum assured, on the ground that various statements made by the deceased in his proposal, including his answer to the seventh question, were, in point of fact, untrue. The respondents, who had acquired right to the policy, thereupon brought an action for recovery of its amount, which was resisted by the appellant upon the same grounds which had previously been assigned by the company for their refusal to pay. The Lord Ordinary (Fraser), after a proof had been taken, gave decree for the respondents; and his judgment was, on a reclaiming note, affirmed by three of the learned judges of the Second Division, Lord Rutherfurd Clark dissenting.

Although other pleas were discussed by him before the Lord Ordinary, the only defence maintained by the appellant in the Inner House and at your Lordships' bar, was that founded on the alleged untruth of the reply given by the deceased to the seventh question in the proposal for assurance.

I entertain no doubt that, according to the law of Scotland, the declaration of the assured taken in connection with the policy itself, in his proposal to the company, constitutes an express warranty that the answer made by him to the seventh question was true. In other words, it is an express and essential condition of the contract, that the policy shall be null and void in the event of the averment by the assured as to his habits, implied in his answer to that question, proving to be false. The doctrine of warranty, as applied to such stipulations in a contract of assurance, is the same in the law of Scotland as in that of England. I am aware that some Scotch judges have in times past objected to the use of the word "warranty" as having no definite significance in the law of Scotland; but in order to shew that such a remark is no longer well founded, I need only refer to the observations made by the Lord President (Inglis) and Lord Mure in *Scottish Life Assurance Society* v. *Buist* (1), and to the opinion of the judges of the First Division in *Life Association* v. *Foster* (2).

Notwithstanding that the warranty is express there still remains for consideration what must be held to be the subject-matter of the warranty. That is a point to be determined in each case, according to the just construction of the question and answer taken per se and without reference to the warranty given. In the present case, the seventh question proceeds from the company, being printed on a form of proposal issued by them for the use of persons who may be desirous of effecting an assurance. The question must, in my opinion, be interpreted according to the ordinary and natural meaning of the words used, if that meaning be plain and unequivocal, and there be nothing in the context to qualify it. On the other hand, if the words used are ambiguous, they must be construed contra proferentes, and in favour of the assured. For my own part, I can discern no ambiguity in the language of question seven. I agree with Lord Rutherfurd Clark, that the import of the answer is precisely the same as if the deceased had affirmed: first, that he was temperate in his habits; and secondly, that he had always been strictly so." In its plain and ordinary sense, that statement is an averment of fact and not a mere assertion of the opinion or belief entertained by the assured with regard to that fact. It then appears to me that whatever may be the import of the word "temperate" (which is a separate matter), the assured must be held to have warranted, not that the assertion was true according to his sincere conviction, but true in point of fact; and consequently, that in order to establish a breach of warranty it is not necessary for the appellant to prove that the assertion was morally false.

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(1) 13 July, 1877: 4 Court Sess. Cas. 4th Series, at p. 1078.

(2) 31 Jan. 1873: 11 Court Sess. Cas. 3rd Series, p. 351.

In the Second Division the majority of the judges were of opinion that the answer in question was a statement, not of fact, but of the personal belief of the assured. Lord Young (in whose opinion Lord Craighill concurred), referred to the views which were expressed by him (as Lord Ordinary) in *Scottish Life Assurance Company* v. *Buist* (1). In that case the assured had given a warranty very similar to that with which we have to deal, being to the effect that his habits were sober and temperate and had always been so; and the learned judge in reference to that warranty said:—

"I mean, however, to express my opinion distinctly to this effect, that an insurance office challenging the policy after the death of the assured, on the ground of untrue answers to queries, and untrue declaration made by him regarding his health and habits of life, undertakes a heavy onus, to the discharge of which it must be strictly held. I do not go the length of saying that gross and wilful falsehood must be proved. But, first, the falsehood must be clear, and on a subject which is, or reasonably may be, material to the risk; and, second, if not wilful, it must be inexcusable in this sense, that it consists in a blameably reckless or careless assertion or omission of which an honest man, giving ordinary attention to the matter in hand, would not have been guilty, and which, in fairness to the office which was deceived, cannot be treated or passed over as immaterial or trifling."

These observations were not necessary to the decision of *Scottish Life Assurance Company* v. *Buist* (1), because the learned judge held it to be proved that the statements warranted had been made fraudulently. But his Lordship adopts his dicta in that case as expressing the principles which ought to govern the decision of the present case; and consistently with these principles, he treats the seventh question as an "appeal to the man himself as to the epithets which he would apply to himself with respect to his habits," and upon that footing he holds that the answer to it cannot be regarded as false. The Lord Justice Clerk seems to have taken substantially the same view; inasmuch as he states that if he "had thought that the answers given here were not given in good faith," he would have agreed with Lord Rutherfurd Clark, who was of opinion that the appellant ought to prevail.

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(1) 13 July, 1877: 4 Court Sess. Cas. 4th Series, 1076.

I am unable to assent to the principles so clearly enunciated by Lord Young in *Scottish Life Assurance Company* v. *Buist* (1). When the truth of a particular statement has been made the subject of warranty, no question can arise as to its materiality or immateriality to the risk, it being the very purpose of the warranty to exclude all controversy upon that point. As the Lord Chancellor (Cranworth) said in *Anderson* v. *Fitzgerald* (2): "Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy." It would, in my opinion, be equally subversive of the contract which the parties make for themselves, to hold (as Lord Young apparently does) that there can be no breach of such a warranty, unless it is proved that the answer of the assured, being untrue, was made by him either wilfully and in the knowledge of its untruth, or inexcusably, in the sense of its having been a blameably reckless or careless assertion.

An ingenious argument was addressed to your Lordships by the respondents' counsel, for the purpose of shewing that the seventh question, from its very nature, involved only matter of opinion and not of fact, and consequently that any reply to it must be treated as an expression of opinion, and not as an assertion of fact. It appeared to me that their argument, which turned upon a very fine-drawn distinction between what were termed matters of pure fact and matters of opinion, had really no practical bearing upon the case before us. There are facts innumerable which can only be ascertained by the test of opinion, but they are not the less facts in a legal, whatever they may be in a metaphysical, sense. It appears to me to be in vain to contend that the character of a man's habits, temperate or intemperate, is matter of opinion and not of fact. The second branch of the fourth question in the proposal submitted by the deceased, furnishes an apt illustration of that which in the ordinary sense is matter of mere opinion as distinguished from matter of fact. It runs thus: "Do you consider yourself of a sound constitution?" That is a query which obviously relates, not to the soundness of the assured's constitution, but to his own opinion on the subject; and in that respect it presents a marked contrast to the terms of the seventh question.

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(1) 13 July, 1877: 4 Court Sess. Cas. 4th Series, 1078.

(2) 14 July, 1853: 4 H. L. at p. 503.

It was also argued for the respondents that in Scotland it has been long settled, by decision, that such a question as the seventh, occurring in a proposal made by the assured, as the basis of a policy upon his own life, is merely intended to elicit the personal opinion or belief of the assured; and that the deceased, William Weems, must be presumed to have given the answer, now said to be untrue, in reliance on that judicial interpretation. It is necessary, therefore, to examine the two authorities which were cited in support of that proposition by the respondents' counsel.

The first of these authorities is the case of *Hutchison and Others* v. *National Loan Fund Life Assurance Company* (1), which was decided by the First Division of the Court of Session, on the 21st of February, 1845. A lady of the name of Armstrong had, in February, 1843, effected an assurance upon her own life with the company, and she died in November of the same year. Her proposal, which was made the basis of the contract of assurance, contained this query, "Has the party an habitual cough, or any disease or symptom of disease? To which the answer was "No," and also a declaration "that I am now in good health, and do ordinarily enjoy good health." In defence to an action for the amount of the policy, the company alleged that the assured was, at the date of the insurance, of intemperate habits, and labouring under disease of the liver, which resulted in dropsy, of which she died. The Lord Ordinary reported the case, upon issues, to the First Division, when the argument turned upon the defenders' pleas, to the effect that the policy was void by reason of there having been a breach of the warranty that the assured was in good health, and had no disease or symptom of disease. What the Court held is best explained by their interlocutor:—"Find that whatever issues may be granted for trying this case, the proposal of Mrs. Armstrong, and declaration therein referred to, form the basis of the contract in the policy of insurance in question, and import a warranty only to the effect that the declarant was and had been, according to her own knowledge and reasonable belief, free from any disease or symptom of disease material to the risk, and that they do not import a warranty against any latent and imperceptible disease that could only be discovered by post-mortem examination, or from symptoms disclosing themselves at an after period of time." Whatever may be the merits of that judgment, it is beyond question that the main reasons assigned for it by the very learned judges who then constituted the First Division, go the full length of affirming that it would have been pactum illicitum, had the assured so answered the query as to take upon herself the risk of her being affected, at the time of entering into the policy, by a latent and deadly disease, the existence of which could only be discovered by a post-mortem examination. As might have been expected, the respondents' counsel did not attempt to vindicate the judgment by reference to these reasons, which they were not prepared to maintain, and preferred to rest it upon another and more reasonable ground, which is very clearly indicated in the opinion of Lord Fullerton. His Lordship construed the answer and declaration as together amounting to nothing more than a statement by the assured that she was at the time in good health; and he further held that "good health," in the ordinary sense of the term, means "the perfect conscious enjoyment of all one's faculties and functions, and the conscious freedom from any ailment affecting them, or any symptom of ailment."

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(1) 7 Court Sess. Cas. 2nd Series, 467.

The second of these authorities is *Life Association of Scotland* v. *Foster*, 31st January, 1873 (1). In that case the association brought an action to reduce a policy which had been effected with them by the deceased, Mrs. Mary Foster, upon her own life, in respect of an alleged breach of warranty. The proposal for assurance contained a declaration by the deceased "that I am at present in good health, not being afflicted with any disorder, external or internal," and an agreement by her that if any untrue statement were made therein, "or in the answers to questions by the society's medical officer in reference to this proposal," the assurance should be null and void. A number of questions were put to Mrs. Foster by the medical officer. The fourth of these was—"Are you now in your own opinion in perfect health?" to which her answer was "Yes"; and the sixth was in these terms: "Have you had rheumatism, gout, rupture, fits, asthma, spitting of blood, disease of the chest, or any affection of the kidneys or urinary organs?" to which she answered "No." To her questions and answers there was appended a declaration by the assured, setting forth that the above statements were "faithful and true." The assured died of rupture, on the 30th of November, 1871, six months and a half after the date of the proposal. A proof was led, from which it appeared that, at the time when she made that proposal, and for some months previously, the assured had a small swelling on her groin, which caused her no inconvenience, and did not affect her general health. That swelling, as subsequent events shewed, was due to hernia; but there was no reason whatever to suppose that the deceased knew that she was affected with hernia, or that the swelling in question indicated to her the existence of that disease. The First Division of the Court, before whom the case depended, held that there had been no breach of warranty, and assoilzied the defenders. It is of importance to observe that the pursuers of the reduction did not plead the untruth of any statement made by the deceased in her proposal for assurance. The only statements upon which they relied as untrue, and therefore constituting a breach of warranty, were those made by the assured in reply to the questions put by their medical officer. Upon this point the Lord President (Inglis) says: "It is not alleged by the pursuers that there is any untrue averment in the words of the declaration itself. They admit that Mrs. Foster was within the fair meaning of the words 'in good health,' and not 'afflicted with any disorder, internal or external.'" The controversy between the parties was therefore narrowed to the single issue—whether the assured, by her sixth reply to the medical officer, had asserted that she was not at the time affected by latent disease, such as rupture, or any of the other diseases specified in his question. It appears to me to have been rightly decided by the learned judges that the assured did not make an assertion to that effect. The assured was, in my opinion, entitled to assume that the object of the doctor who put questions to her concerning her health, in the course of his medical examination, was to elicit from her such facts as were within her knowledge for his own information and guidance; and, to my mind, the terms of the sixth query indicate that it was addressed to her for no other purpose. The assured had already told him, in reply to query fourth, that "in her own opinion" she was, at the time, "in perfect health." That was followed up by the sixth query, which does not ask, "Have you, at present, rheumatism, gout, rupture, &c.," but "Have you had these diseases or any of them?" The query relates, not to present time, but to the past: and whilst it can be reasonably construed as referring to every form of active disease of which the assured must have been previously conscious, I think it would be unreasonable to hold that the query was meant to refer to antecedent latent disease, of which the assured was unconscious.

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(1) 11 Court Sess. Cas. 3rd Series, 351.

I am accordingly of opinion that *Life Association of Scotland* v. *Foster* (1) has really no bearing upon the doctrine in support of which it was cited. A very different question would have arisen for decision in that case if the assured had, in the proposal which she submitted as the basis of assurance, affirmed that she was not, "at the time," affected with hernia. As for the case of *Hutchison* v. *National Loan Fund Life Assurance Company* (1), it is impossible to assent to the general principles upon which it was decided; and, to my mind, it is not clear that the decision could be justified upon other grounds. But it is unnecessary to consider that question, because, assuming these cases to have the effect contended for, they do not appear to me to give the least support to the respondents' case. Both these authorities relate to internal disease, of the existence of which the person affected is unconscious, and which medical examination cannot detect, until he is in extremis, or, it may be, until life is extinct; and the only point arising for decision was, whether a particular query or statement was so expressed as to include latent and unknown, as well as apparent and known, diseases. But intemperate habits are certainly not, in any sense, latent disease, only discoverable in a post mortem examination. Such habits may, in some instances, be occult; but, as a general rule, the knowledge of them is not confined to their owner: indeed it may happen that their outward manifestations are more readily appreciated by bystanders than by the man himself. The purpose for which such a query as the seventh question in this case is addressed to intending insurers, is to elicit the fact, and not the opinion of the assured; and, if he chooses to give a satisfactory answer, he must take the risk of its being true. If his answer is hesitating or unsatisfactory, the insurers are put upon their guard, and have the option of declining the assurance, or seeking information from other sources, or of charging a higher premium.

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(1) 11 Court Sess. Cas. 3rd Series, 351.

I now come to the second question in this appeal, which, as I have already said, is a question, not of law, but of fact. Was the late William Weems, on the 9th of November, 1881, and had he previously been, a man of "temperate habits," as he then asserted? If that question must be answered according to the truth, and not according to the personal belief of the deceased, two of the judges of the Second Division, the Lord Justice Clerk, and Lord Rutherford Clark, were of opinion that he was not. It does not clearly appear what view of the evidence would have been taken, upon that assumption, by Lords Young and Craighill; but I think the Lord Ordinary was prepared to hold, and did hold, that the deceased was, in point of fact, a man of temperate habits within the meaning of the seventh question. I entirely agree with many of the observations which were made by the Lord Ordinary in regard to what ought, for the purposes of this case, to be considered as constituting temperate habits, although, upon the evidence before us, I am unable to come to the same conclusion as his Lordship. I am disposed to think that the learned judge must have attached undue weight to the case of the *Knickerbocker Life Assurance Company of New York* v. *Foley* (1), in regard to the rubric of which his Lordship says: "The law here stated is that which the Lord Ordinary adopts, and which he has endeavoured to apply in his present judgment." Now, as I read the rubric and report, there was no law laid down in that case. An American jury had found that a man was of temperate habits, although it had been proved at the trial that he had an attack of delirium tremens; and the Court refused to disturb the verdict, the main reason assigned for that decision being a statement occurring in some treatise on medical jurisprudence, to the effect that, in the case of an intemperate man, delirium tremens is occasioned by abstinence from drink, and, in the case of a temperate man, by indulgence in liquor. Even if it had been laid down as matter of law, I should hesitate very much to adopt such a standard as that. A man suffering from delirium tremens occasioned by recent drinking may possibly be more temperate than another man who is similarly afflicted in consequence of his having abstained from his usual potations; but I should not like to affirm that either of them was, in the ordinary sense of the term, a man of temperate habits. It is, however, perfectly clear that a mere finding of fact by a jury cannot, although the Court may have declined to set it aside and grant a new trial, form any precedent for the guidance of a court of law.

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(1) 7 Court Sess. Cas. 2nd Series, 467.

I believe it to be useless to attempt a precise definition of what constitutes "temperate habits," or "temperance," in the sense in which these expressions are ordinarily employed. Men differ so much in their capacity for imbibing strong drinks that quantity affords no test; what one man might take without exceeding the bounds of moderation, another could not take without committing excess. In judging of a man's sobriety, his position in life, and the habits of the class to which he belongs must, in my opinion, always be taken into account; because it is the custom of men engaged in certain lines of business to take what is called refreshment, without any imputation of excess, at times when a similar indulgence on the part of men not so engaged would be, to say the least, suspicious. But I do not think that the habits of a particular locality ought to be taken into account, or that a man, who would be generally regarded as of intemperate habits, ought to escape from that imputation because he is no worse than his neighbours. In the present case the evidence clearly establishes that the assured was a most able and estimable man; but that circumstance is not of much weight, because able and estimable men are not necessarily exempt from social failings. I shall not dwell upon the details of the proof of the import of which I take very much the same view which is clearly and succinctly expressed in the opinion of Lord Rutherfurd Clark. It seems to me to be the fair result of the evidence, that the assured was in the habit of taking more drink than was good for him: that he was frequently affected with drink on occasions when all except himself were sober; that his indulgence to excess had become so apparent that several of his friends remonstrated with him on the subject, and that, instead of repudiating the charge, he admitted it and promised amendment. These facts appear to me to be fully proved, and they are, in my opinion, altogether inconsistent with the truth of the assertion that he was, on the 9th of November, 1881, of temperate habits, and had always been so. I cannot, in considering this part of the case, leave out of view the cause of the assured's death as certified by the late Dr. Colligan. The statement in his certificate was made by Dr. Colligan in the ordinary course of his professional duty, and in compliance with statutory enactment. There is nothing to suggest that the statement was made dishonestly or even negligently; and it is, in my opinion, good primâ facie evidence of what the medical attendant of the assured judged and believed to be the cause of his death. Of course it is not conclusive evidence that death was due to chronic hepatitis; it may be rebutted. But the testimony of Dr. Hunter is not, in my opinion, sufficient to displace it. That gentleman saw the assured at Bridge of Allan about a month before his death; but he did not examine the assured, or visit him professionally, until within a few days of his decease, after congestion of the brain had set in. The witness had not the same opportunity of determining what was the primary disease as the medical attendant of the patient who visited him daily for a fortnight before brain symptoms supervened; and the facts certified by Dr. Colligan are strongly corroborated by the other evidence in the case.

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(1) 26 Albany Law Jour. 70; 15 Otto, Sup. Ct. (U.S.) Rep.; see 11 Court Sess. Cas. 4th Series, at p. 665.

I therefore agree with your Lordship that the interlocutors appealed from must be reversed and the cause remitted, with directions to assoilzie the appellant. I think the appellant ought to have the costs of this appeal as well as his expenses of process in the Courts below.

LORD FITZGERALD:—

I also am of opinion that the answers of the assured to the questions: "(1.) Are you temperate in your habits, and (2.) Have you always been strictly so? Answer—(1.) Temperate; (2.) Yes"—formed parts of the basis of the contract of assurance, and that the assured warranted those answers to be true. By "true" I mean true in fact without any qualification of judgment, opinion, or belief. I confine my observations to the very answers now before us. If untrue in fact the policy is void, and the persons cannot recover. The law of Scotland is on this subject identical with that of England. The inquiry for your Lordships is whether the evidence is sufficient to satisfy you that the assured had been prior to the effecting this policy intemperate in his habits.

"Temperate in habits" is a sentence to be interpreted, and though not to be taken in the Pythagorean sense of "total abstinence," yet seems to import abstemiousness, or at least moderation—

"The rule of 'not too much,'
By temperance taught."

I am, my Lords, inclined to adopt a fair and liberal interpretation, having regard to the position of the individual, the habits of the locality, and even the peculiarities of the local municipal authorities in adjourning to neighbouring public-houses "to continue the debate," but notwithstanding all these allowances I am coerced to come to the conclusion that the evidence is sufficient to establish that the assured was not a person of temperate habits; on the contrary, his habits of intemperance had been repeatedly observed at the town council and on other public occasions. He has been shewn at times to have been incapable of transacting business or taking care of himself. He was remonstrated with by friends, and does not seem to have denied the impeachment, and finally there is evidence that he was elected provost in the hope that the responsibilities of office might produce reformation of habit. The evidence for the defenders is not in my judgment displaced by the negative evidence led for the pursuers. The cause of death, too, is confirmation strongly of the assured having fallen into that fatal habit which produces

> "* * * * * *all the kinds*
> *Of maladies that lead to death's grim cave*
> *Wrought by intemperance.*"

It was against this danger the insurers sought protection.

My Lords, I entirely concur with the noble Lord opposite (Lord Watson) in his reasons and in his criticisms on the Scotch decisions.

Interlocutors appealed from reversed; cause remitted with directions, and the appellant to have the costs of this appeal as well as his costs in the Court below.

Lords' Journals, 1st August, 1884.

Agent for appellant: *W. A. Loch*, for *J. Russell, C.S.*
Agent for respondents: *J. Balfour*, for *John Macpherson, W.S.*

[PRIVY COUNCIL.]

J. C.*
1884
June 10, 11, 12, 25.

PLIMMER AND ANOTHER . . . . . APPELLANTS;

AND

THE MAYOR, COUNCILLORS, AND CITIZENS OF THE CITY OF WELLINGTON . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL, NEW ZEALAND.

Law of New Zealand—Right to Compensation—Wellington Harbour Board and Corporation Act, 1880—*The Public Works Act*, 1882, *s.* 4—"*Estate or interest in land.*"

Land having become vested in the respondents under the Wellington Harbour Board and Corporation Land Act, 1880, the appellants claimed compensation under the Public Works Act, 1882, on the ground of their having some estate or interest therein within the meaning of the latter Act.

It appeared that the appellants' lessor (or his predecessor in title) had in 1848 erected a wharf on the said land, with the permission of the Government, and in 1855 a jetty; that in 1856, at the request and for the benefit of the Government, he incurred large expenditure for the extension of his jetty and for the erection of a warehouse; that in subsequent years the Government used, paid for, and, with the consent of the said lessor, improved the said land and works:—

Held, that the lessor must be deemed to have occupied the ground from 1848 under a revocable license to use it for the purposes of a wharfinger; that by virtue of the transactions of 1856 such license ceased to be revocable at the will of the Government, whereby the lessor acquired an indefinite, that is, practically, a perpetual right to the jetty for the purposes aforesaid. The equitable right so acquired is an "estate or interest in, to or out of land" within the wide meaning of the Act of 1882, which directs that in ascertaining title to compensation the Court should not be bound to regard strict legal rights only but should do what is reasonable and just.

Ramsden v. *Dyson* (Law Rep. 1 H. L. 129) approved.

APPEAL from an order of the Court of Appeal (June 6, 1883,) made on the hearing of a special case stated for the opinion of the Court.

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* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

The facts stated in the special case sufficiently appear in the judgment of their Lordships.

The question for decision was whether the appellants had any estate or interest which would entitle them to compensation in respect of the lands in question under the provisions of the Colonial Acts above mentioned. The special case was stated by a Compensation Court constituted under the Public Works Act, 1882, which was incorporated with the Land Act of 1880 and its amending Act of 1882. It was stated for the opinion of the Supreme Court, and by the latter Court was transferred to the Court of Appeal, who answered it in the negative.

Their judgment is as follows:—

"We think this case may be safely decided on the one ground, that Plimmer had the Ark and the entire wharf, as a tenant at will, and that what took place in 1861, when the jetty, as it exists at present, was severed from the Ark, constituted a determination of the then existing tenancy at will over the whole, and the creation of a fresh tenancy at will as to the remainder. If this be the case, the possession of the claimant starts from 1861, and the statutory period of limitation would not, therefore, have expired when the land became again vested in the Crown in 1876. The land on which the Ark itself stood was occupied first in 1848, by the permission of Sir George Grey, the then Governor. The jetty erected in 1855 appears to have been erected without any objection being raised on behalf of the Crown, but without the sanction of any existing authority. In October, 1855, however, the land on which the Ark and the jetty stood became vested by grant in the superintendent. Of this grant the case finds Mr. Plimmer to have been aware. Shortly after the grant was issued, Mr. Plimmer, at the request of the Provincial Government, extended the jetty, and having reclaimed some land adjoining the Ark, he, at the request of the Provincial Government, erected a shed for the accommodation of immigrants on a portion of the land so reclaimed. At this time therefore, the position of matters was as follows:—Mr. Plimmer had built a wharf on land that had become vested in the superintendent for provincial purposes. Mr. Plimmer and the Provincial Government were aware how the title stood, and Mr Plimmer, at the request of the Provincial Government, took possession of other parts of the land held under the same grant, and extended the existing wharf at one end of it, and erected buildings at the other. As to the land which he then took possession of at the request of the Provincial Government, there is no doubt that, in taking possession of it, he became tenant at will to the superintendent. The extension of the jetty would be, however, useless without the existing jetty, and it must therefore have been in contemplation both of Mr. Plimmer and the Provincial Government, when he was requested to extend the existing jetty, that he should be allowed to occupy the existing jetty. It seems to us that the evidence is conclusive that at the time of the extension of the jetty the occupation of the then existing jetty was permissive, and that Mr. Plimmer was at that time the tenant at will of the then existing jetty. When such tenancy commenced is of no moment; all that is material for the present argument is the undoubted fact that it had not commenced twenty-one years before 1861, so as to oust the superintendent, and that there was nothing to alter the relations of the parties between the time of the extension of the jetty and the time of the occurrences in 1861. There being, therefore, a tenancy at will of the Ark, the land adjoining, and the jetty in 1861, how do the occurrences of that year affect the relations of the parties? The case states that the Provincial Government, with the permission of Mr. Plimmer, cut away that part of the jetty which extended from the Ark to a few feet beyond the present eastern line of Custom-house Quay; that they reclaimed the land on which the jetty stood, and converted the land into part of a public street. Now, it appears clearly, from the other part of the case, that the permission said to have been given by Mr. Plimmer was not given by him as claiming to be entitled to the fee simple of the land, or as asserting a legal right to it. He came, as the case shews, as a suppliant to the Provincial Government, appealing, therefore, not to his legal rights, but to the public faith of the province. As I understand, the effect of this taking possession of a part of the entire tenement by the Provincial Government, with the assent of the tenant at will, would be to determine the tenancy at will which then subsisted as to the entire tenement. The part that was taken possession of was essential to the then mode of enjoyment of the tenement as a whole. The ultimate effect also of the operations of the Provincial Government would have been to have rendered the part of the jetty which they did not occupy incapable of enjoyment as a jetty at all, because, when the reclamation was finished, a gap was left between the jetty and the eastern line of Custom-house Quay. If it were necessary to shew that the Provincial Government entered into occupation of a part—and, in our opinion, it is quite unnecessary—still there is evidence that they did occupy it, because the space left between the quay and the jetty was part of it, and, by leaving this space, they prevented the beneficial enjoyment of the remainder by Mr. Plimmer. It is not, however, sufficient to decide that the former tenancy at will was determined: it must be further shewn that a new tenancy at will was then created. This, I think, is shewn clearly by the circumstance that the title of the superintendent to the fee was well known to Mr. Plimmer, and that he obtained permission, as the case states, to connect the residue of the jetty with the breastwork of Custom-house Quay. That permission was necessary to his enjoyment of the jetty, and was, in effect, an express permission to enjoy it thenceforward. To create a new tenancy-at-will it would be sufficient if, after the determination of the existing tenancy, a fresh permission could be implied. Here the permission is expressed. The answer, therefore, to the first question is in the negative."

Webster, Q.C., and *Ollivier*, for the appellants, contended that this judgment was wrong. The transactions referred to in the case did not create a mere tenancy at will. The appellants derived title in this way; they were grantees of persons who had an exclusive easement over the jetty. Their lessor or his predecessors in title became occupiers of this jetty for more than twenty-one years, and when the property was revested in the Crown in 1876 it did not get a right to eject the appellants. By this exclusive occupation or possession, originally obtained by permission, but continued for more than twenty-one years without acknowledgment of a superior title, the appellants had acquired the fee: see

3 & 4 Will. 4, c. 27. The Government, moreover, had acknowledged Plimmer's title as to part of the land in dispute and compensated him for disturbance of his rights in 1863. The respondents in their printed case contend that the land in question was at the date of appropriation by Plimmer part of the sea-bed in the Port of Wellington, and therefore was incapable of appropriation by him. There is, however, nothing illegal in an erection below low-water mark: see Hale de portibus maris, cited from Hargreave's Law Tracts, pp. 85, 46, 70, 73, and Hale's Treatise de jure maris, chap. v. (Hall on the Sea Shore, Appendix, p. xiv.) Reference was made to *Attorney-General* v. *Terry* (1); *Orr Ewing* v. *Colquhoun* (2); *Attorney-General* v. *Earl of Lonsdale* (3); *Reg.* v. *Betts* (4); *Cory* v. *Bristow* (5); *Day* v. *Day* (6); *Mayor of Brighton* v. *Guardians of the Poor of Brighton* (7); *Tickle* v. *Brown* (8). Lastly, if Plimmer did not obtain the fee he had originally permission to occupy the ground and construct the works mentioned in the case. The subsequent acts of the Government, those in 1857–1861, did not destroy the beneficial user of that part of the jetty which remained undisturbed, nor did they amount to a re-entry by the superintendent over the whole of the lands occupied by Plimmer. On the contrary, the right of occupation by the appellants' lessor was recognised. He was allowed to remain as before and induced to lay out money at the request and for the benefit of the Government, and thereby acquired a right to retain the land for an indefinite time for the special purposes for which it had been granted. This right is at least within sect. 4 of the Public Works Act, 1882, and the appellants are entitled to compensation under that Act in respect of such portion of that right as has passed to them under their lease.

Davey, Q.C., and *Elton*, for the respondents, contended that the appellants' right or interest in the land could not be put higher than that those from whom they claimed were in 1848

(1) Law Rep. 9 Ch. 423.
(2) 2 App. Cas. 839.
(3) Law Rep. 7 Eq. 377.
(4) 16 Q. B. (N.S.) 1022.
(5) 2 App. Cas. 262.
(6) Law Rep. 3 P. C. 751.
(7) 5 C. P. D. 368.
(8) 4 Ad. & E. 369.

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licensees with a revocable licence. But whatever relations then subsisted between them and the Government were put an end to by the transactions in 1857–1861, whereby the Government, as held by the Supreme Court, reasserted their paramount title as owners in fee. From that time at least they were mere tenants at will and had no interest or estate within the meaning of the Compensation Act. With regard to the acts done and moneys expended by Plimmer, there was no question in this case of acquiescence or of standing by on the part of the Government such as arose in *Ramsden* v. *Dyson* (1). The occupant here did not believe the land to be his own, he knew and had recognised that it belonged to the Government; and he chose to spend his money with that knowledge. Reference was made to *Locke Matthews* (2): *Laird* v. *Briggs* (3). No subject can appropriate the bed of the sea except by embankment and reclamation: Hale, de jure maris, chap. vi., and de portibus maris, chap. vi. This land vested in the superintendent of this harbour by virtue of the Harbour Act of 1854: see sects. 4 and 5. He made no contract with those from whom the appellants claim. It does not appear that he would have been authorized to do so to the extent of granting title. Even if he were, there is no equity on the part of the appellants apart from contract equivalent to an estate or interest in the land within the meaning of the Compensation Act. All that can be said is that Plimmer built a jetty on the land of the Government, at his own cost and with the Government's leave and license. Plimmer trusted that the Government would not turn him out. That raises no equity in his favour. If the Government had seen him building under the belief that he had a title and did nothing to undeceive him, that would have raised an equity, but that is not the case here. As to the equity arising from the landowner having induced him to spend money: see *Dann* v. *Spurrier* (4); *East India Company* v. *Vincent* (5); *Duke of Devonshire* v. *Eglin* (6); *Russell* v. *Watts* (7).

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(1) Law Rep. 1 H. L. 140.
(2) 13 C. B. (N.S.) 753.
(3) 19 Ch. D. 22.
(4) 7 Ves. 231.
(5) 2 Atk. 83.
(6) 14 Beav. 530.
(7) 25 Ch. D. 559.

[SIR ARTHUR HOBHOUSE referred to *Dillwyn* v. *Llewelyn* (1).] As to licenses see *Rex* v. *The Inhabitants of Horndon-on-the-Hill* (2).

Ollivier replied, referring to *Gaved* v. *Martyn* (3).

The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE:—

The sole question for their Lordships in this appeal is one which is put by the special case stated for the decision of the Supreme Court, viz., "Had the claimants any estate or interest in the land upon which the remains of the jetty stood when such land became vested in the respondents under the Wellington Harbour Board and Corporation Land Act, 1880; and, if so, what was the nature of such estate or interest?" The Supreme Court have answered this question in the negative. Their Lordships will state briefly the material facts which explain the question.

In the year 1848 one John Plimmer moored an old hulk, known as Noah's Ark, in the bed and on the foreshore of Wellington Harbour for the purpose of a wharf and store. This was done by permission of the Crown, represented by Sir George Grey.

In January, 1855, there came an earthquake which raised the ground and so reduced the depth of water; and in order to carry on his business of a wharfinger, John Plimmer erected a jetty extending to a considerable distance from the shore. The extension so made is coloured yellow on the plan used for the purpose of this appeal, and the land used for a portion of it is the land mentioned in the question. It was about 190 feet in length. It is not stated that any permission was obtained for this work.

On the 18th of October, 1855, the then Governor, acting under statutory powers, granted to the superintendent of the province of Wellington a portion of the harbour, including the land occupied by Plimmer. It is not necessary to follow minutely the legal title to the land. It is sufficient to say that, under whatever form, it has been continuously vested in Government for public purposes, that the use made of it by Plimmer was consistent with those purposes, and that Plimmer might by contract with the Government have acquired a perpetual interest in it for such purposes.

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(1) 4 De G. F. & J. 517.
(2) 4 M. & S. 562.
(3) 19 C. B. (N.S.) 732.

Some time before the month of June, 1856, John Plimmer, at the instance of the Provincial Government, extended his jetty about 112 feet further into the harbour. That extension is shewn by the green colour on the plan. He also reclaimed some land, and, at the suggestion of the provincial authorities, built thereon a warehouse or shed for the accommodation of immigrants, who were being introduced into the colony by the Provincial Government.

From the year 1856 to the year 1863, when the Queen's wharf came into use, Plimmer's jetty and warehouse were largely used for the immigrants, and charges were paid to him by the Government and others for such use.

In the year 1857 the Government began to reclaim portions of the harbour included in the grant of 1855, and contiguous to the land in Plimmer's occupation, and they proceeded to make on the reclaimed land a quay nearly at right angles to and across the yellow part of Plimmer's jetty. For the purpose of that work, with the permission of Plimmer, they cut away the shore end of his jetty. But his business was not interrupted thereby, for during the work he used a temporary gangway to connect his severed jetty with the shore, and when the work was completed in the year 1861, he was permitted to connect the remaining portion of the jetty with the breastwork of the new quay.

Subject to the alterations above mentioned, Plimmer's jetty or wharf was continually used as a landing place for passengers and goods from the time of the first placing of Noah's Ark down to the assumption of possession by the respondents. And in the year 1872 the Government, acting under statutory provisions, declared it to be a legal quay or landing-place.

The special case sets out in detail certain proceedings taken with reference to the reclamation of ground by the Government, and to a claim of pre-emption by Plimmer, but, in the view their Lordships have taken of the case, those transactions have little bearing on the question.

The title of the appellants stands as follows. In 1872 they became yearly tenants of John Plimmer. In 1875, John Plimmer sold to Jacob Joseph his interest in the jetty, then described as a certain freehold wharf which has been duly legalized as a landing-place, subject to the yearly tenancy of the appellants. Mr. Joseph subsequently granted to the appellants a lease for the term of twenty-one years, commencing from the 1st of January, 1879, at an annual rental of 75*l.* The date of this lease is not mentioned in the case.

In the early part of the year 1878, the appellants extended the jetty some seven or eight feet, and on the 15th of March, 1878, the Secretary of Customs wrote to them as follows:—

> "It has been reported to the Government that the wharf known as Plimmer's Wharf has recently been extended. I have therefore been directed by the Honourable the Commissioners of Customs to inform you that this wharf has been erected without the sanction or authority of the Government."

That letter is the earliest intimation of objection on the part of the Government. It must be taken that the latest extension of the jetty was a trespass. But if the assertion as to want of sanction was meant to apply to the entire wharf, it is at variance with the whole preceding history of the case.

The land was vested in the respondents by a statute which came into force on the 1st of September, 1880. In April, 1881, they brought ejectment, to which of course the appellants had no defence, and in December, 1882, the respondents took possession.

The claim for compensation is made under a statute which came into force on the 13th of September, 1882, the terms of which may conveniently be quoted here. After reciting the statute of the 1st of September, 1880, it is enacted by s. 4:—

> "Every person who immediately before the date of the passing of the said Act had any estate or interest in, to or out of the lands by the said Act vested in the corporation, or any part of such lands, and every person who has suffered loss or damage by the vesting by the said Act of the said lands or any part thereof in the corporation, may make a claim for and shall be entitled to receive full compensation from the corporation: Provided always

that, in ascertaining and determining the title of any claimant to compensation, the Compensation Court shall not be bound to regard strict legal rights only, but may award compensation in respect of any claim which the Compensation Court may consider reasonable and just, having regard to all the circumstances."

By the terms of the special case, and the proceedings taken in the Supreme Court, there is not in issue before this Board any question of compensation to the appellants, except such as depends on their having some estate or interest in, to, or out of the lands vested in the corporation.

The appellants desire to rest their claim on the ground that John Plimmer was a trespasser throughout, and that a good title has been gained by possession without payment or acknowledgment. Countenance is given to this contention by the Government letter of the 15th of March, 1878; but, as before observed, the whole history of the case is against it. It is clear that, at least up to the year 1872, the Government and John Plimmer were acting in accord, and there is no trace of a trespass until the year 1878.

It is true that under the Statute of Limitations (3 & 4 Wm. 4, c. 27), which the counsel agreed to be in force in New Zealand, it is not necessary to shew trespass or adverse possession in order to gain a title by lapse of time. If the original permission is carried back far enough, the title may be gained by mere omission of acknowledgment. But their Lordships are of opinion, and so far they agree with the Supreme Court, that the transactions of 1857–61 amount to a new arrangement. The subject-matter of the occupation was then changed, and changed by consent. And upon this question it makes no difference whether John Plimmer is regarded as a licensee or a tenant at will, for in either case the new agreement obliterates the effect of the previous lapse of time. And as these transactions did not end till some time in 1861, the requisite twenty years had not elapsed by the 1st of September, 1880, which is the point of time at which the respondents' interest is to be ascertained. For this reason it is unnecessary to examine whether any subsequent transactions affected John Plimmer's occupation in the same way.

The respondents, however, seek to attribute to the transactions of 1857–61 a much stronger effect. They insist that those transactions not only gave a fresh starting-point for the lapse of time, but that they entirely destroyed the previous relations between the parties, so that prior agreements or equities cannot be taken into consideration. Their Lordships are asked to hold that the Government entered upon John Plimmer's occupation by its paramount title as owner, and that whatever was left to him was left of pure bounty. It would seem that the Supreme Court accepted this contention. They say that Plimmer did not give his permission to the operations of the Government on the ground that he claimed to be entitled to the fee simple of the land, or that he asserted a legal right to it, but that he came as a suppliant to the Government, appealing, not to his legal rights, but to the public faith of the province. And they hold that in 1861 he took as a mere tenant at will, and that the occupation remained on that footing until it was lawfully determined by the act of the respondents.

In these conclusions their Lordships are unable to agree. They cannot find anything in the special case to shew that John Plimmer failed to assert any right he possessed, or that he surrendered anything except by agreement, or that he or the Government acted as if he were at their mercy The special case is obviously framed with great care, so as to express what acts were done by permission and what were done otherwise. It may be that Plimmer did not claim a fee simple, seeing that he had no ground for such a claim; but it does not at all follow that he did not claim a right of permanent occupation, or that the Government did not recognise such a right. At all events, what we know is that there was mutual concession. Plimmer allowed the Government to take away the shore end of his jetty; and the Government allowed him to make a temporary gangway, and, when the works were completed, to have the support of their new quay for his jetty in its altered state. It is easy to imagine how both parties were calculated to benefit by the transaction; but we need not speculate on their motives. Their Lordships rest on the statements in the case, and from those statements they cannot draw any inference, except that the transaction was one of mutual agreement between the parties for their mutual benefit, and not one of paramount right on the one side and appeals to mercy or to honour on the other. And the effect of the agreement is to leave John Plimmer with precisely the same interest in the altered jetty as he previously had in the original jetty. What was that interest?

Plimmer's original works were erected with the permission of the Government, and their Lordships think that he must be taken to have occupied the ground under a revocable license to use it for special purposes, viz., those of a wharfinger. Whether the yellow extension was so held when first made need not be discussed, because, after the month of June, 1856, when the green extension had been made, the whole was certainly held upon the same tenure. In their Lordships' opinion it was still held upon license to use for the original purposes, but by the transactions of 1856 the license had ceased to be revocable at the will of the Government.

The law relating to cases of this kind may be taken as stated by Lord Kingsdown in the case of *Ramsden* v. *Dyson* (1). The passage is at page 170:—

> "If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory* v. *Mighell* (2), and, as I conceive, is open to no doubt. If at the hearing of the cause there appears to be such uncertainty as to the particular terms of the contract as might prevent a Court of Equity from giving relief if the contract had been in writing but there had been no expenditure, a Court of Equity will nevertheless, in the case which is above stated, interfere in order to prevent fraud, though there has been a difference of opinion

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(1) Law Rep. 1 H. L. 129.

(2) 18 Ves. 328.

amongst great judges as to the nature of the relief to be granted. Lord Thurlow seems to have thought that the Court would ascertain the terms by reference to the Master, and if they could not be ascertained would itself fix reasonable terms. Lord Alvanley and Lord Redesdale, and perhaps Lord Eldon, thought this was going too far; but I do not understand any doubt to have been entertained by any of them that, either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a Court of Equity would give relief, and protect in the meantime the possession of the tenant. If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of Law or Equity can enforce. This was the principle of the decision in *Pilling* v. *Armitage* (1), and, like the decision in *Gregory* v. *Mighell* (2), seems founded on plain rules of reason and justice."

This case of *Ramsden* v. *Dyson* (3) was strongly pressed in argument against the conclusion to which their Lordships have come, and it was said that Lord Cranworth's judgment, which represented the opinion of the majority, lays it down that an equity of the sort now relied on cannot be raised unless the occupant who improves the land believes it to be his own, and the owner of the improved land knows of that mistaken belief. But there was no disagreement among the judges on the principles of law laid down in that case. Only Vice-Chancellor Stuart first, and after him Lord Kingsdown, drew from the evidence inferences of fact at variance with those drawn by the majority of the House, and so brought out a different legal conclusion.

The main conclusions of fact to which Lord Cranworth applied his principles of law were, to state them very briefly, as follows: that as to part of the improved land, the tenant, when taking it for building purposes, expressly contracted in writing to hold it at will; that as to all the land, he was a substantial gainer in point of rent by so holding; that he never believed he had any higher right; that the landlord never knew or suspected what kind of assurance his agent was holding out to the tenant; but that, even if the statements of the agent were to be ascribed to himself, he expressly refused to come under any legal obligation, and the tenant as expressly submitted to trust to the honour of the Ramsden family.

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(1) 12 Ves. 78.
(2) 18 Ves. 328.
(3) Law Rep. 1 H. L. 129.

In the present case, the equity is not claimed because the landowner has stood by in silence while his tenant has spent money on his land. This is a case in which the landowner has, for his own purposes, requested the tenant to make the improvements. The Government were engaged in the important work of introducing immigrants into the colony. For some reason, not now apparent, they were not prepared to make landing-places of their own, and in fact they did not do so until the year 1863. So they applied to John Plimmer to make his landing-place more commodious by a substantial extension of his jetty and the erection of a warehouse for baggage. Is it to be said that, when he had incurred the expense of doing the work asked for, the Government could turn round and revoke his licence at their will? Could they in July, 1856, have deprived him summarily of the use of the jetty? It would be in a high degree unjust that they should do so, and that the parties should have intended such a result is, in the absence of evidence, incredible.

With respect to the occupant's belief in his own title and the knowledge of that belief on the part of the Government, it may be worth while to remark that the land in question was not like ordinary private property. It was the bed of the sea, useless till somebody converts it to use, and not unfrequently used by unauthorized persons to get profit by accommodating the public. It is difficult to suppose that a person who is so using the sea bed, and the Government who are its owners, can go on dealing with one another in the way stated in this case for a series of years, except with a sense in the minds of both that the occupant has something more than a merely precarious tenure. Their Lordships will not be the first to hold, and no authority has been cited to them to shew that after such a landowner has requested such a tenant to incur expense on his land for his benefit, he can without more and at his own will take away the property so improved. Their Lordships consider that this case falls within the principle stated by Lord Kingsdown as to expectations created or encouraged by the landlord, with the addition that in this case the landlord did more than encourage the expenditure, for he took the initiative in requesting it.

On this view it becomes quite intelligible why, before the Government interfered with Plimmer's jetty in executing their works of 1857–61, they should have obtained his permission, which on the other view was not necessary. And the subsequent transactions down to 1878, though they do not lend any strong support to the same view, are consistent with it, and are rather more favourable to it than to the opposite one. The Government used, paid for, and gave a legal status to the property which it is now said they might have taken to themselves.

The question still remains as to the extent of interest which Plimmer acquired by his expenditure in 1856. Referring again to the passage quoted from Lord Kingsdown's judgment, there is good authority for saying what appears to their Lordships to be quite sound in principle, that the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated.

In such a case as *Ramsden* v. *Dyson* (1) the evidence (according to Lord Kingsdown's view) shewed that the tenant expected a particular kind of lease, which Vice-Chancellor Stuart decreed to him, though it does not appear what form of relief Lord Kingsdown himself would have given. In such a case as the *Duke of Beaufort* v. *Patrick* (2) nothing but perpetual retention of the land would satisfy the equity raised in favour of those who spent their money on it, and it was secured to them at a valuation. In such a case as *Dillwyn* v. *Llewelyn* (3) nothing but a grant of the fee simple would satisfy the equity which the Lord Chancellor held to have been raised by the son's expenditure on his father's land. In such a case as that of the *Unity Bank* v. *King* (4) the Master of the Rolls, holding that the father did not intend to part with his land to his sons who built upon it, considered that their equity would be satisfied by recouping their expenditure to them. In fact, the Court must look at the circumstances in each case to decide in what way the equity can be satisfied.

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(1) Law Rep. 1 H. L. 129.
(2) 17 Beav. 60.
(3) 4 D. F. & J. 517.
(4) 25 Beav. 72.

In this case their Lordships feel no great difficulty. In their view, the licence given by the Government to John Plimmer, which was indefinite in point of duration but was revocable at will, became irrevocable by the transactions of 1856, because those transactions were sufficient to create in his mind a reasonable expectation that his occupation would not be disturbed; and because they and the subsequent dealings of the parties cannot be reasonably explained on any other supposition. Nothing was done to limit the use of the jetty in point of duration. The consequence is that Plimmer acquired an indefinite, that is practically a perpetual, right to the jetty for the purposes of the original licence, and if the ground was afterwards wanted for public purposes, it could only be taken from him by the legislature.

An analogy to this process may be found in such cases as *Winter* v. *Brockwell* (1) and *Liggins* v. *Inge* (2). These cases shew that where a landowner permits his neighbour to execute works on his (the neighbour's land), and the licence is executed, it cannot be revoked at will by the licensor. If indefinite in duration, it becomes perpetual. Their Lordships think that the same consequence must follow where the licence is to execute works on the land of the licensor, and owing to some supervening equity the licence has become irrevocable.

There are perhaps purposes for which such a license would not be held to be an interest in land. But their Lordships are construing a statute which takes away private property for compensation, and in such statutes the expression "estate or interest in, to or out of land" should receive a wide meaning. Indeed the statute itself directs that, in ascertaining the title of anybody to compensation, the Court shall not be bound to regard strict legal rights only, but shall do what is reasonable and just. Their Lordships have no difficulty in deciding that the equitable right acquired by John Plimmer is an interest in land carrying compensation under the Acts of 1880 and 1882.

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(1) 8 East, 308.

(2) 7 Bing. 682.

The proper answer to the question will be as follows:—That John Plimmer acquired and transferred to Jacob Joseph a perpetual right to occupy and use the land in question for the purposes of a jetty or wharf, and that the interest which the appellants had in the land on the 1st of September, 1880, was the term which then remained to them under the lease granted to them by Jacob Joseph. Their Lordships will humbly advise Her Majesty that an answer to the foregoing effect be substituted for the answer given by the Supreme Court, and the Respondents must pay the costs of the appeal.

Solicitors for the appellants: *J. & R. Gole.*

Solicitors for the respondents: *W. & J. Flower & Nussey.*

[PRIVY COUNCIL.]

J. C.*
1884
June 25.

JAMES MACKELLAR . . . . PLAINTIFF;

AND

EMMA CHARLOTTE BOND . . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Law of Natal—Surety Bond by a Woman—Effect of Non-Renunciation of Legal Privileges.

By the law which prevails in *Natal* a woman cannot be effectually bound as a surety, unless she specially renounces the privileges secured to her by the Senatûs Consultum Villeianum and other rules of law.

Where a husband under a general power of attorney from his wife professed to bind her personally as surety under a mortgage bond duly executed, *held*, that, there being no authority to renounce as aforesaid, express or implied, given by the power of attorney, such deed was void.

APPEAL from a decree of the Supreme Court (Sept. 8, 1884).

The action was brought to recover £1500 on a mortgage bond dated the 13th of October, 1882, which was executed in favour of the Appellant as general manager of the Natal Bank, by Granger under a power of attorney given to him by Thomas Bond, and dated the 9th of October, 1882. The bond purported to be a continuing security for the payment of certain promissory notes, bills of exchange, drafts, or the like, or for advances under or to be made on overdrawn current or any other accounts. The bond also contained the following provision :—"The Appearer q.q. renounces the benefit of the legal exceptions non numeratæ pecuniæ non causa debiti, and if need be the benefit of his constituent's ante-nuptial contract and the beneficia Senatûs Consulti Villejani de authenticæ si qua mulier ordinis seu excussionis et novæ constitutionis de duobus vel pluribus reis debendi with the force and effect of which he acknowledges himself to be perfectly acquainted." Thomas Bond, the husband of the Respondent, had received from his wife a general power of attorney dated the 20th of November, 1874.

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* *Present:*—LORD WATSON, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR ARTHUR HOBHOUSE.

The plea was that neither Bond nor Granger was authorized to renounce the benefit of such exceptions in any transactions whatever to be carried out by the said power of attorney, neither was it requisite for the said Bond to do so in furtherance of the duties delegated to him by the said power of attorney.

Matthews, Q.C., and *Wright*, for the appellant, contended that the respondent was bound, for that it was competent to Bond and Granger under the circumstances of the case, and the nature of the transactions contemplated by the power of attorney, in order to "effectuate the intention," see *Goodtitle* v. *Bailey* (1), to renounce the legal privileges relied on. Moreover, there is evidence that the property comprised in this mortgage bond was not part of the property reserved to the respondent as separate estate after her marriage by the ante-nuptial contract, and therefore Bond had by his jus mariti, and right of administration, the sole power of alienation. The property in question had been acquired by the husband's trading, and was therefore alienable by him. Reference was made to Voet, book xvi., tit. i.; pars. 9–11; Grotius, Introduction to Jurisprudence, book i., c. 5, pars. 21–24; book iii., ch. iii., pars. 13-14; Van der Keessel's Theses, art. 92; Chaplin on Trustees [ed. 1859], p. 151; Van der Keessel's Theses,

(1) 2 Cowp. 600.

par. 251; Grotius, book ii., ch. 12, sect. 11; Van Leeuwen, Censura Forensis, book i., c. 12, § 10; *Steyn* v. *Trustees of Steyn,* Buchanan's Rep., 1873, p. 105, and 1874, p. 16.

Jeune, and *Laughton* (of the Natal Bar), for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

LORD WATSON:—

This appeal is taken in an action brought at the instance of the appellant, in his capacity of acting general manager of the Natal Bank, for the purpose of enforcing the rights of the bank under a mortgage bond granted upon the 13th of October, 1882. By that bond one Granger professed, as attorney for the respondent, Mrs Bond, to bind her personally as a surety to the bank for the floating balance that might be due by a firm of Johnstone & Co., at any time, to the extent of £1500, and also to mortgage to the bank a property in Church Street, Pietermaritzburg, in further security. By the law which prevails in Natal a lady cannot be effectually bound as a surety, even where she executes the deed by her own hand, unless she specially renounces the benefits of the Senatûs Consultum Velleianum, and also the benefits of another rule, de authenticâ. The effect of these privileges is to render her deed altogether void, unless she has expressly renounced her right to plead them. Mr. Granger has renounced that right on her behalf. He was merely a sub-attorney, authorized specially to that effect by Mr. Bond, the respondent's husband, who held a general power of attorney from the respondent dated the 20th of November, 1874. If that power of attorney gives Mr. Bond authority to make such a renunciation on behalf of his wife, then these legal privileges were well renounced by his attorney, Mr. Granger, because the general deed of November, 1874, gives him authority to delegate. We must, therefore, look to the bond of the 20th of November, 1874, for the purpose of ascertaining whether Mr. Bond had any power to impose an obligation of suretyship upon his wife, and also to renounce the protection which the law gave her against the consequences of entering into such an obligation. It appears to their Lordships to be doubtful whether the power of attorney gives Mr. Bond any power to bind his wife as a surety. It may be plausibly argued that the words "securities, of what nature or kind soever," from their position in the context, can only be held to mean securities for money taken or money given; and the general words that follow,—"to perform all such acts and things," and so forth,—which were strongly founded upon by the counsel for the appellant, may very naturally be read as powers to perform such acts as are necessary or for the advantage of the wife in relation to the management of her estate. But it is not necessary to determine the precise limits of the power of attorney in that direction, because their Lordships are of opinion that there is no power given by this deed to dispense, on behalf of the lady, with the protection which the law affords her in case of a deed being executed by her, or for her, binding her as a surety. There are no express words in this power of of attorney giving her husband such authority, nor do there appear to their Lordships to be any words from which it can be fairly implied that the lady had in view the renunciation of her legal privileges, or that she intended to confer any authority to renounce them on her behalf.

These observations dispose of the whole case that is before the Board. But it is necessary to advert to one or two other points which have been raised at the Bar, not for the purpose of deciding them, but for the purpose of shewing that they do not arise, and cannot be decided, in this appeal.

First of all it is maintained that, by the law of Natal, Mr. Bond had by the virtue of his jus mariti and right of administration, one or other, or both, power to dispose of all property belonging to this lady which was not expressly reserved as her separate estate, after marriage. And it was contended that there was evidence, or at least that it might fairly be inferred as a matter of fact, that the property in question, which was mortgaged by the deed of the 13th of October, 1882, was really property the administration and power of disposal of which rested entirely with the husband. But the mortgage deed, which embodies the transaction between the parties, proceeds on the plain footing that the property thereby given over as security was the separate estate of the lady, and that the husband had only authority to dispose of it—indeed, he professes that he has no other authority

—by virtue of the power of attorney which he had got from his wife in the year 1874. It would be a very strong thing in the face of that profession, upon which the mortgage transaction proceeds, to infer from some mere scintilla of evidence—for there is nothing more in this case—that this property stood in such a position that by law Mr. Bond had the sole power of alienation. The authorities that were cited at the Bar may or may not be well decided in the circumstances to which they apply. Upon that point it is unnecessary to offer any opinion. It is sufficient to say that there are no facts proved or pleas stated in this case which can raise any question in which they would be available as precedents. The declaration is laid wholly on the bond. It is framed upon the footing that the husband had power to dispose of his wife's property because he was her attorney. There is an attempt, no doubt, to validate his exercise of the power by alleging that the lady had an interest in the firm to cover whose debit balances in account with the bank the security was given; but that is not proved to have been the fact.

Then another point was taken, the third plea in the replication being an averment to the effect that at the time of the marriage the value of her estate was very small, and that the property in question, the mortgaged property, had been entirely acquired by the husband's trading, and had been under his uncontrolled administration. It is possible that if those facts had been made out some of the authorities we were referred to might apply. It might be that these facts, if established, would give the husband full authority to alienate the property. But not one word of that allegation has been established by proof. Therefore the only point really raised by the pleadings and by the evidence being whether or not Mr. Bond had, under the power of attorney, authority to renounce these legal exceptions on the part of his wife, their Lordships have no hesitation in coming to the conclusion that the judgment of the Court below is well founded. They will, therefore, humbly advise Her Majesty to affirm the judgment of the Court below, and to dismiss the appeal with costs.

Solicitors for appellant: *Travers, Smith & Braithwaite.*
Solicitors for respondent: *Johnston, Harrison, & Powell.*

[PRIVY COUNCIL.]

J. C.*
1884
June 13, 17; July 12.

THE COMMISSIONER FOR RAILWAYS . DEFENDANT;

AND

MARGARET TOOHEY . . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Act, 43 Vict. No. 25, ss. 3, 5—Right to run Steam Motors on Tramways.

Held, that the Commissioner for Railways in New South Wales has, according to the true construction of Act 43 Vict. No. 25, sect. 3, a legal right to run steam motors upon the tramway lines mentioned in the 2nd schedule thereto.

Semble, sect. 5 is sufficient to legalise the use of steam motors upon the other tramways governed by the said Act.

APPEAL from a judgment of the Supreme Court (May 18, 1883) ordering that the verdict obtained by the appellant should be set aside, and a new trial had between the parties on the grounds that the verdict was against evidence and the weight of evidence, and that the judge should have directed the jury that the appellant had no legal right to run steam motors upon the tramway lines authorized by the Tramways Extension Act, 1880 (43 Vict. No. 25).

The facts are stated in the judgment of their Lordships.

Davey, Q.C., and *Rigby*, Q.C. (*J. D. Wood* with them), for the appellant.

Clarke, Q.C., and *C. G. Ellis*, for the respondent.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This appeal is in a suit brought by the respondent, as administratrix of Michael Toohey, in the Supreme Court of New South

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* *Present:*—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR RICHARD COUCH.

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Wales against the Appellant for negligence in driving and managing what is called in the declaration a tram motor, and a train of tram carriages attached thereto, upon and along a public street in the city of Sydney, called Elizabeth Street, and thereby causing the death of Michael Toohey. The defendant pleaded Not guilty, upon which the plaintiff took issue. At the trial before Mr. Justice Faucett the jury found a verdict for the defendant. A rule for a new trial was moved for on the grounds, 1, that the verdict was against evidence and the weight of evidence; 2, that Mr. Justice Faucett should not have directed the jury that the defendant had a legal right to run steam motors upon the tramway lines. There is no note in the record of the summing-up to the jury, but it seems to have been admitted that this direction was given. On the argument of the rule, a count was added to the declaration by leave of the Court, which stated that the defendant wrongfully drove and caused to be driven along a certain highway in the city of Sydney a certain dangerous machine, to wit, a certain steam motor or engine, and the said Michael Toohey, whilst lawfully using the said highway with his horse and cart, was struck and knocked down by the said steam engine of the defendant being so driven as aforesaid, and his death was caused as stated in the first count. The Supreme Court, consisting of three judges, after hearing counsel, ordered a new trial on both grounds.

The Commissioner for Railways has appealed to Her Majesty in Council on the grounds that the employment of steam as a motive power was not unlawful, and that on the question of negligence the weight of evidence was in his favour. As the former question was the first argued before their Lordships, they will dispose of it first.

The tramroad upon which the steam motor was being driven at the time of the accident was authorized to be constructed by an Act of the legislature of New South Wales (42 Vict., No. 18), passed in 1879.

By the 3rd section of that Act the Commissioner of Railways was charged with the construction and completion of this tramroad, and was to have all such powers and authorities created by the Act, 22 Vict., No. 19, as were necessary for fully carrying into effect the purposes of the Act, and then followed a provision similar to that in the 5th section of the Act which follows.

By another Act passed in 1880 (43 Vict., No. 25), and called the Tramways Extension Act, 1880, the Act of 1879 was repealed. And by the 2nd section it was enacted that tramways for conveying passengers and their luggage and other goods and merchandise should be constructed as soon as conveniently might be along the several routes set forth in the first and third schedules thereto, as well as along any other route or routes within the city of Sydney and the suburbs thereof which might be approved by the Governor with the advice of the Executive Council. The fifth section is as follows:—

> "The Commissioner for Railways shall be charged with the construction, completion, and maintenance of all tramways constructed or maintained under this Act, and shall have power to enforce tolls or charges for the carriage of passengers, luggage, and goods by and along any such tramway, and shall have and may exercise all such powers and authorities created by the Act 22 Vict., No. 19, as are necessary for fully carrying into effect the purposes of this Act, and shall be subject to all the like rules, regulations, liabilities, and obligations in relation thereto as he is subject to in respect of railways by the said Act, so far as the same are applicable to such purposes; and except as herein expressly enacted all other the provisions of the said Act applicable to the construction, completion, maintenance, conduct, and working of and to the imposing of tolls or charges for the conveyance of passengers, goods, or chattels, and generally to the regulation of the lines of railway to be constructed thereunder, shall so far as applicable as aforesaid apply to the construction, completion, management, maintenance, conduct, working, imposition of charges for and regulation of the tramways to be constructed under this Act."

Although the words "maintained under this Act" occur in the early part of this section, the concluding words shew that it was intended to apply to the tramways described in the first and third schedules which were to be constructed under that Act. The construction of this 5th section is not free from difficulty.

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The words in the latter part, "so far as applicable as aforesaid," seem to refer to the previous words necessary for fully carrying into effect the purposes of this Act." And if it is considered, looking at the 2nd section, that the purposes of the Act were not merely the construction and maintenance of the tramway, but the conveying passengers and their luggage and other goods and merchandise, the latter part of the section may reasonably be construed as applying to the means of traction.

But the section which is applicable to the tramway in Elizabeth Street is the 3rd. That tramway is described in the 2nd schedule, and the 3rd section enacts that the tramway described in the 2nd schedule, and all buildings, offices, and works connected therewith constructed under the authority of the repealed Act, shall be maintained and worked by the Commissioner under the authority of that Act, who for that purpose shall and may exercise all the powers and authorities and incur all the obligations respectively conferred and imposed upon him by that Act and the Act incorporated therewith with reference to tramways to be constructed thereunder. The Act incorporated by the 14th section is the 22 Vict., No. 19. Sect. 100 of that Act makes it lawful for the Commissioner, under and subject to such orders, restrictions, and regulations as shall from time to time be made by the Governor, with the advice of the Executive Council, to use and employ locomotive engines or other moving power, and carriages and waggons to be drawn or propelled thereby, and to carry and convey upon the railways all such passengers and goods as shall be offered for that purpose, and to make such charges in respect thereof as may from time to time be determined upon by the Governor, with the advice of the Executive Council. And by sect. 141 the word "railway" shall be construed to extend to any tramway constructed or worked under the provisions of the Act. Their Lordships think there can be no doubt that by locomotive engines in this Act engines worked by steam were intended; and with reference to their use on tramways, it is not unimportant that sect. 115 gives to the Commissioner, subject to the approval of the Governor and Executive Council, power to make regulations for, among other purposes, regulating the mode by which and the speed at which carriages using the railways are to be moved or propelled. In their Lordships' opinion, the provision in the 3rd section of the Tramways Extension Act, 1880, that for the purpose of working the tramway described in the 2nd schedule the Commissioner should and might exercise all the powers and authorities conferred upon him by 22 Vict., No. 19, with reference to tramways to be constructed under it, made it lawful for him to use the steam motor upon the tramway in Elizabeth Street. In the order of the Supreme Court for the new trial, the direction is stated generally "that the defendant had a legal right to run steam motors upon the tramway lines," and it would seem from the reasons of the judges that it was thought necessary to decide the question as to the tramways in the 1st and 3rd schedules as well as the 2nd. If, however, the direction is right as to the tramway in question in this action, the verdict cannot be set aside for misdirection. It is not necessary for their Lordships to come to any decision as to the use of steam motors upon the other tramways, but they may say they think the 5th section, though the construction of it may not be free from doubt, is sufficient to make the use of them legal.

Although the use of the steam motor upon the tramway was lawful, the Commissioner would be liable for an injury caused by the negligent use of it, and their Lordships agree with the Supreme Court in thinking that the verdict as to this was against the weight of the evidence.

There were for the plaintiff three witnesses who saw the accident, and had a full opportunity of observing what happened.

The deceased was in a cart laden with sewerage, sitting on the right-hand side of it. He had to cross Elizabeth Street, and, in consequence of the tramway being under repair, and the street blocked, he had to go some twenty or thirty yards along the line. The motor was coming in the opposite direction, and the cart could have been seen by the man in it from some distance, and in time to have stopped before reaching the cart. He did not do so, but went on, and struck the cart, the deceased being thrown out. One of the witnesses, a policeman, who was walking in Elizabeth Street towards the cart, the motor being then behind him, said he heard Toohey and other men shouting to warn the motor, but it did not appear to pull up.

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For the defendant were called the driver, conductor, and fireman of the motor. The first said Toohey's cart had got perfectly clear of the tramway, and was about two feet clear when they were within twelve or thirteen yards of him, and the cause of their striking him would be his pulling the off rein or the horse shying, which is only conjecture. The cart being two feet clear of the tramway is not consistent with Toohey and the men shouting to give warning, and is opposed to the evidence of the plaintiff's witnesses, who were better able to observe where it was. The conductor said he observed a slackening of speed, whilst the fireman said he did not observe any,—he was too busily engaged. It is possible there was some slackening of speed at the time of the accident, as they were only a few yards from the stopping-place, but it was not in time or sufficient to prevent the striking the cart. It was argued that the jury were warranted in believing the driver, but the weight of evidence was greatly in the plaintiff's favour, and there was no apparent reason for discrediting her witnesses.

The appellant has failed to shew that the order for a new trial ought to be reversed, and their Lordships will humbly advise Her Majesty that it should be amended by omitting the second ground. The costs of the appeal will be paid by the appellant, as the order is fully supported by the first ground on which it was granted.

Solicitors for appellant: *John Mackrell, Maton, & Co.*
Solicitors for respondent: *Donnithorne & Ewer.*

[PRIVY COUNCIL.]

J. C.*
1884
June 12, 13.

DYSON AND ANOTHER . . . . DEFENDANTS;

AND

GODFRAY. . . . . PLAINTIFF.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Law of Jersey—Set-off—Liquid Demand.

According to the law of Jersey a claim by way of compensation or set-off is admissible, when it is for a liquid demand.

Such claims having been dismissed by the Court below the case was remanded to ascertain whether they were in whole or in part liquid debts or debts "incontestées ou du moins incontestables" as alleged by the appellants.

APPEAL from a judgment of the Royal Court (May 23, 1883), affirming a judgment of the Inferior Court of the Island (February 3, 1883), whereby it was ordered that Dyson, or, in his default, the other appellant Baudains, should pay to Helliwell, since deceased, and represented by the respondent as his junior administrateur, £495 10*s*.

The facts are stated in the judgment of their Lordships.

The question of law raised in this appeal was, whether a claim of set-off (compensation) made by the appellants was rightly dismissed by the Courts below without investigation.

Forbes, Q.C., and *Cyril Dodd*, for the appellants, contended that by the law of Jersey a claim for compensation was admissible and should have been investigated. Reference was made to *La Cloche* v. *La Cloche* (1); Le Geyt's Law of Jersey [ed. 1847], vol. ii. pp. 412, 414, 415; Dictionnaire de Droit Normand [ed. 1780, at Rouen, by Houard], p. 314, vo. "compensation"; Basnage's

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(1) Law Rep. 3 P. C. 136; 4 P. C. 325.

Works, p. 89, art. 21, and to Coutume de Paris, art. 105, and an arrêt of 1665 mentioned therein; Terrien [ed. 1578], bk. vii. c. 6; Pothier on Obligations, pt. III., c. 4, "of compensation."

Wills, Q.C., and *Wills* (*J. Ogle*, with them), for the respondent, denied that this right of set-off existed. Jersey law was derived from Normandy, but only the law of that country anterior to 1216 is applicable, for the reason that at that date Normandy was finally separated from the English Crown, whereas Jersey remained annexed to it. In that year the French seized Normandy as forfeited, and in 1259 Henry III., by treaty, formally ceded his title to it. Although in 1360, by the treaty of Bretigny, Normandy was ceded to Edward III., it was lost again in 1374; though reconquered by Henry V. in 1415–1418 it was lost by Henry VI. in 1450, and was never after 1216 formally and completely re-annexed to the English Crown. Reference was made to 4 Co. Inst. c. 70. The right to compensation did not exist by the law of Normandy in the beginning of the 13th century, though no doubt it existed later on. [Sir Robert P. Collier:—You cannot go back to the 13th century when Terrien and others recognise that right since.] Reference was made to Bouteiller, who wrote on customary law in 1479, see ed. 1653, by Charondas le Caron, pp. 154 and 323. Admitting that there may be a right to compensation, it still must be in respect of a liquid demand: Toullier, vol. vii., pp. 428, 432, on compensation; Chabrol Chaméane, Dictionnaire législation usuelle (ed. 1835), vo. "compensation and reconvention."

Dodd, replied.

The judgment of their Lordships was delivered by

Sir Robert P. Collier:—

The circumstances under which this case arises may be shortly stated thus: On the 18th of September, 1880, Mr. Dyson, the defendant, entered into a contract with Mr. Godfray, Greffier of the States of Jersey, on behalf of the States Market Committee, for the purpose of executing and completing all the "iron founders', painters', and glaziers' patent work mentioned in certain specifications and general conditions," and so on. There follow various provisions usual in contracts of this kind; among others, that the payments shall be made according to the certificate of the architect, and that extras are to be allowed and deductions are to be made only according to his certificate, and that part payment is to be made in the first place of 75 per cent., and subsequently of what remains. It concludes in these terms:—"And it is hereby further agreed that seven days will be allowed from the date hereof in order that the contractor may examine the plans and specifications, to test the accuracy of the list of quantities; and any errors discovered therein, and communicated in writing to the architect within that time, will be rectified, and be added to or deducted from the amount of the contract price, as the case may be, but no additions or deductions will be made in respect of such errors after the expiration of the said seven days; such additions or deductions to be made by the architect, whose decision shall be final." It appears that, some time before this, what may be called a bill of quantities was delivered to Mr. Dyson, and the only material items in it are 1500 feet of Helliwell's patent glazing round base of tower," and "21,200 feet superficial Helliwell's patent glazing to main roof and of roof of tower." Mr. Dyson put his price on these quantities, £187 10*s.* and £1855, and he made his tender upon that footing, which tender was accepted, and led to the contract which has been first referred to. Fourteen days were given for the discovery and rectification of errors.

The next transaction which it is necessary to refer to is a subcontract entered into between Mr. Dyson and Mr. Helliwell, the architect, who had a patent in respect of glazing work, on the 20th of August, 1881, which is in these terms:—"In consideration of your executing the roof glazed work, &c., as stated in my contract for these works, and at the sums named in my contract, I agree to pay to you the sums named in such contract, and amounting to £2042 10*s.*, immediately after I have received it from the Markets Committee, or such sums as I may receive from them." On the 17th of November, 1882, which is the next date of importance to be found in this very meagre record, a certificate is given to this effect:—"New Markets, St. Helier's, Jersey, Mr. J. Dyson's account. Amount of contract, including glazing roofs and painting, £4229; extras on deductions, £9 13*s.* 3*d.*," making £4238 13*s.* 3*d.* "Cash on account," £3250; deductions for less value in gates, £20, making £3270, leaving a balance of £968 13*s.* 3*d.* due. On the 6th of December of that year an order was made in accordance with this certificate upon the treasurer to pay this money within ten days from that date to Dyson, being, as it is stated, the balance remaining due to him upon the contract; and it will be observed that under this certificate the whole excess of the extras over deductions was £9 13*s.* 3*d.* The plaintiff attached this sum in the hands of the treasurer for a debt which he alleged to be due to him; claiming £495 10*s.*, being the balance of the sum of £2042 10*s.* which he was to be paid under his contract, and brought this suit to recover it. Thereupon defendant obtained its release upon giving security. He states in his case that he received £4218 19*s.* 1½*d.*, which is the very sum he is entitled to under the certificate of the 17th of November, 1882.

Mr. Dyson defends himself against this action on two grounds. Firstly, that in the bill of quantities, which has been before referred to, there was a material mistake—an over-statement of the quantities which would amount, according to the prices given, to a sum of £301 4*s.* 7½*d.*, and he says that, instead of being indebted to Helliwell in £495 10*s.*, he is only indebted to him in £194 5*s.* 4½*d.* He contends that he is liable to pay Helliwell, not a lump sum for the whole of the work executed, but at the rate of so much per foot; and, consequently, that he is entitled to a deduction for each foot less than the number specified. It is to be observed that, although he has fourteen days according to the bill of quantities, and seven days further according to the contract, to point out any errors in the quantities, he discovers no errors until two or three days after the certificate of November 1882, when he employs another architect to make the measurements, whose measurements differ from the measurements of Mr. Helliwell. Their Lordships do not find in the record any such

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allegation as was made in the case presented to them on the part of the appellant, of fraud on the part of Helliwell, nor is there any direct allegation even of mistake; but, be that as it may, they are of opinion that the Court was substantially right in the view which they appear to have taken, namely, that the plaintiff accepting the sum of £968 as the balance of his account, that sum was applicable to the sub-contract with Helliwell, to whom he was bound to pay the sum due under it, and that, if there was a mistake, it was for the Market Committee in Jersey to avail themselves of it, if they thought fit or were able so to do. Mr. Dyson repudiates no portion of the sum as not due under the contract, but lays claim to the whole of it under pretence of a charge for extras for which there is no foundation, inasmuch as the only extras certified for and recoverable amount to £9 13*s.* 3*d.*

These being the facts of the case, it appears to their Lordships that the Court was right in holding that the defendant could not contest the claim of Helliwell to the balance of £495.

But another question of more difficulty arises. The defendant claims what we should call a set-off, but which perhaps is more properly called, according to the civil law, a claim for compensation, and he puts in this way:—"En effet, le dit Sieur Dyson a fait au dit Sieur Helliwell des fournitures pour la reconstruction du marché à lard pour une somme liquide et admise au montant;" the whole sum amounts to £368 18*s.* 7*d.* As far as their Lordships are able to see from this record, the Courts of Jersey have taken no notice whatever of this demand beyond dismissing it. They do not appear to have applied their minds to it in the slightest degree in order to ascertain whether the claim was liquid or illiquid, or whether it was true or false.

It has been argued on the part of the plaintiff that, according to the law of Jersey, no claim whatever for compensation is admissible; and it was said that such had been once the law of Normandy. Undoubtedly the law of Jersey was founded originally upon the law of Normandy, and such may have been the law of Normandy 600 or 700 years ago; but their Lordships think it is unnecessary to go back to so ancient a date. On

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referring to Basnage, a book frequently quoted in Jersey as an authority (as appears from the report of the Commissioners), it is said, that although originally what are called letters from the Chancellerie were necessary in order to enable a defendant to set up a claim by way of compensation, yet that in his time this claim would be made "*ipso jure*, nonobstant le transport et au préjudice du créancier arrêtant, avant la déclaration de compenser." This view is confirmed by Terrien, who has been referred to in more than one case before this Board as some authority with respect to Normandy and Jersey law; and it is also in accordance with the book upon Jersey law by De Geyt, which, as far as their Lordships are aware, is the most authoritative work on Jersey law, published comparatively recently as a compilation of all the law relating to the administration of justice in the island, but written some hundred years ago. According to these authorities, a claim by way of compensation is admissible when it is for a demand which is termed liquid. Perhaps the best definition of what may be called a liquid demand is found in Pothier, Obligations, 1st vol., part 3, chapter 4, paragraph 628: "Il faut 3° que la dette qu'on oppose en compensation soit liquide. Une dette est liquide lorsqu'il est constant qu'il est dû, et combien il est dû, *cùm certum est an et quantum debeatur.* Une dette contestée n'est donc pas liquide, il ne peut être opposée en compensation, à moins que celui, qui l'oppose, n'en ait la preuve à la main, et ne soit en état de la justifier promptement et sommairement." The Courts of Jersey ought to have ascertained whether this was a liquid demand in that sense. If they had found that it was a demand made for the purpose of delaying payment of the sum sought in the action, that would be a good ground for dismissing it. On the other hand, if they thought that the objections to it were frivolous, that would be a ground for dismissing the objections. Again, if they came to the conclusion that, instead of being an admitted debt, or a debt capable of being readily proved, it raised a question which would give rise to serious litigation, it would not properly come under the head of a liquid demand. But all these questions must be considered by the Court; and inasmuch as they have not applied their minds to them, their Lordships think that the case should go back to the Royal Court of Jersey for the purpose of dealing with this set-off in the manner which has been indicated. Under these circumstances their Lordships will humbly advise Her Majesty that it ought to be declared that James Dyson is justly indebted to Thomas William Helliwell in the sum of £495 10*s.* sued for, but that the decree or order of the Royal Court of Jersey, of the 23rd of May, 1883, appealed from, ought to be reversed to the extent of £369 8*s.* 7*d.* of the said principal sum of £495 10*s.*, and that the said decree or order ought to be reversed in so far as it rejects the plea of compensation set up by the appellant; and that the cause ought to be remitted to the Royal Court of Jersey to consider and determine whether the appellant's counter-claims to the amount of £369 8*s.* 7*d.* are in whole or in part liquid debts, or debts "incontestées ou du moins incontestables," as alleged by the appellants, and to proceed further in the cause as may seem just. There will be no costs of this appeal.

Solicitors for appellants: *Williamson, Hill & Co.*
Solicitors for respondent: *Van Sandau, Cumming, & Armitage.*

[PRIVY COUNCIL.]

DAVID GUILLAN CLARK . . . . . DEFENDANT;

AND

JOHN GUILLAN CLARK AND JANE LAWRENCE (BY HER NEXT FRIEND GEORGE CLARK ALLAN). . . . . PLAINTIFFS.

J. C.*
1884
June 26, 27;
July 12.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Purchase of Testator's Estate by an Executor who has not proved—Suit to set aside Sale.

Held, that a sale is not to be avoided merely because when entered upon the purchaser has the power to become trustee of the property purchased, as for instance by proving the will which relates thereto, though in point of fact he never does become such. Such a purchaser is under no disabilty, and in order to avoid such sale it must be shewn that he in fact used his power in such a way as to render it inequitable that the sale should be upheld.

APPEAL from a judgment of the Supreme Court (Dec. 12, 1882) reversing a judgment of Molesworth, J. (June 2, 1882), which dismissed the bill.

The bill was filed on the 15th of August, 1881, and prayed to set aside an agreement for the purchase by the appellant of the interest of John Clark, deceased, in certain premises and the business of a tanner carried on by him in co-partnership with his sons the appellant and George Clark, and for relief incidental thereto. The facts are stated in the judgment of their Lordships.

The Supreme Court in ordering this sale to be set aside, relied chiefly on the ground that the appellant had not, at the time when he agreed to buy the partnership property and the tannery, renounced the office of executor under John Clark's will, holding that, "until a person appointed executor unmistakeably divests himself of that character, or by his solemn act puts it out of his power ever to clothe himself with it, he is as much incapacitated

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* *Present:*—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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from purchasing from his co-executor as if he had obtained probate."

They also held that a surviving partner is bound to lay before the executor of a deceased partner the fullest information, or, if he has not full information, explicitly to inform him that he has not; and is responsible if anything material is not made known, either purposely or through carelessness; and that, as the valuation of the partnership property contained material omissions, this was of itself a ground for holding that the purchase might be set aside.

They also held that the sale could have been successfully challenged on the ground of a misrepresentation of the value of testator's estate, made by both the vendor executor and the appellant directly to the plaintiff Jane Lawrence, and indirectly to the plaintiff John Guillan Clark.

Davey, Q.C. (*J. D. Wood* with him), for the appellant, contended that the appellant never having proved the testator's will, or in any manner acted in the administration of his estate was not in any fiduciary position towards the residuary legatees which rendered him incapable of purchasing the property in question. It was unnecessary to the validity of this sale, that the appellant should before he agreed to buy have formally divested himself of the character of executor under John Clark's will. No such ground was relied on in the bill. The case made by the bill was one of fraud and misrepresentation, and that had failed. The terms of the agreement were fair and were arrived at after considerable family discussion. Though the appellant had the power to become executor at any time, it was not alleged or proved that he had used such power unfairly or at all during the negotiations or in reference to his purchase.

Macnaghten, Q.C., and *Gardiner*, for the respondents, contended that the question was, whether this sale could, under all the circumstances, stand in a Court of Equity as against the respondents, who were infants at the time. Was this in reality as in form a sale by the executor to the appellant acting fairly by the estate and at arm's length? The appellant had not renounced probate, and threatened to prove if the sale was not made to him at a certain price, while Balderson (the executor) said to the beneficiaries if you don't let me sell at a certain price I will renounce. Balderson in fact only accepted the office of executor with his hands tied, and under an obligation to carry out a pre-arranged scheme. [SIR RICHARD COUCH :—You should have averred that he was guilty of breach of trust.] This, moreover, is a suit by infants who did not know the provisions of the partnership deed, nor of the debt due to the partnership; and they cannot be bound by acquiescence unless it is shewn that the transaction came to their knowledge with all the circumstances after they came of age.

Counsel for the appellant were not called on to reply.

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The judgment of their Lordships was delivered by

SIR ARTHUR HOBHOUSE :—

In this case a bill was filed on the 15th of August, 1881, to set aside a transaction which was entered into in the month of April, 1866. The plaintiffs, the now respondents, are the two youngest children of John Clark, viz. John Guillan Clark, who attained twenty-one in October, 1869, and Jane, the wife of William Lawrence, who attained twenty-one in January, 1867. Mrs. Lawrence sues by her next friend George Clark Allan, and her husband is a defendant. The principal defendant, the now appellant, is David Clark, the eldest son of John Clark.

In 1864 John Clark had for some time been carrying on a tannery business near Melbourne. In July, 1864, he took his two sons David and George into partnership; and in January, 1866, on the sudden and simultaneous death of John and George, David became surviving partner. The impeached transaction is the purchase of the partnership assets and of the site of the business by David.

The partnership was regulated by a deed made in April, 1865, of which the now material provisions were, that the business should be carried on upon certain land belonging to John Clark; that so long as it was so carried on he should be entitled, in addition to his share in the profits, to receive out of the funds of the partnership, by way of rent, the sum of £150 a year; that John's stock-in-trade should be taken by the partnership at the price of £5300, which should be considered as a loan and a first charge upon the partnership assets; that he should be entitled to receive out of the funds of the partnership, in addition to his share of the profits, interest at 7 per cent. on that sum, and that the net profits should be divided in the proportions of one half to David and one fourth to each of the others.

By his will, John Clark appointed David and a Mr. Balderson his executors and trustees, and the guardians of his infant children, and he gave directions for the conversion of his real and personal estate and its equal division amongst his children. The surviving children were five in number, the three parties to this appeal, Ann Clark, and Agnes, the wife of G. L. Allan.

When the news of John and George's deaths arrived, which happened on the 16th of March, 1866, David had to consider his position; and he was advised by counsel, on the 11th of April, 1866, to the effect that if he wished to continue the business he had better not prove the will, that it would not be judicious for him to continue the business for the benefit of himself and the family, and that arrangements should at once be made for winding up the business. Counsel then suggested that David might make a fair arrangement with the representatives of John and George for the purchase of their shares, but that in such case it was essential that he himself should not be one of those representatives.

In point of fact, David never did prove his father's will. On the 1st of May, 1866, he renounced by deed the office of trustee and executor, and all trusts, powers, and authorities whatsoever by the will expressed to be made or given to himself and Balderson. There is no allegation in the bill, and no suggestion in the evidence, that he ever acted as executor or guardian, or was looked upon by the others of the family as filling either of those characters.

On the 17th of May, 1866, Balderson alone proved John Clark's will. In August Ann Clark took out administration to George. On the 15th of October Balderson and Ann executed a deed whereby they agreed to sell to David their interest in the partnership assets, and the land whereon the business was conducted, for the sum of £5000. By the same instrument David gave security for payment of the purchase-money with interest to Balderson by ten instalments, the last of which fell due on the 4th of May, 1871. The stipulated payments were duly made by David to Balderson, and accounted for by Balderson to the beneficiaries.

This is the transaction which the respondents have impeached, and which has been set aside by the decree of the Supreme Court now appealed from. It is impeached by the bill on the one ground of fraud and misrepresentation on the part of David, but that ground is not the only one on which the Court has rested its judgment.

There are passages in this judgment from which it appears that the Court considered that at least until his final renunciation David must be treated as being an executor, and that he was also guardian to the respondents. And it has also been contended that the sale may be considered as one by an executor to himself, and as proceeding upon misrepresentation made by David the surviving partner to David the guardian of the infant legatees. If that were so, of course it could not stand when duly challenged by the beneficiaries. But David never was a guardian at all. And their Lordships cannot agree that a sale is to be avoided, merely because when entered upon the purchaser may, at his option, become the trustee of the property purchased, though in point of fact he never does become such. A man so placed might possibly use his power in such a way as to raise a case for setting aside the transaction, and whether David so acted is one of the questions to be decided. But that is a different thing altogether from the absolute disability attaching to one who would at the same moment be a vendor in trust for others and a purchaser on his own behalf. No such case as that existed, nor was any such charged by the bill.

The case made by the bill is to the following effect. That at a family meeting held soon after the news of John Clark's death had arrived, David stated that John Clark's entire estate was not worth more than £5000, and offered to give the four others of the family £1000 each for the purchase of the whole estate, excepting a saddlery business; that, relying on the good faith of David, believing his statement as to value, being in great distress of mind, and anxious to avoid a family quarrel which David threatened to force on, Jane, who was then twenty years old, and Ann and Agnes who were adult, assented to David's proposal, and that John, who was only seventeen years of age, was not consulted; that the three sisters expressed their desire to have independent legal advice, but did not persist in their wish, because David expressed great indignation thereat as an impeachment of his good faith; that David never stated his intention of disclaiming the trusts till he had procured the assent of his sisters to his proposal, but executed the deed of disclaimer immediately afterwards; that, on the 15th day of October, 1866, an agreement was executed by Balderson of the first part, Ann Clark (who had become the legal personal representative of George) of the second part, and David of the third part, by virtue of which David claimed to have become absolutely entitled to the tannery and the land on which it stood, but that the plaintiffs were ignorant of its purport or effect; that though David's three sisters and brother knew as a matter of repute that a partnership existed between John, David and George, they were in entire ignorance of its terms, and it was not until the month of April, 1881, or thereabouts, that by accidental discovery of the indenture of partnership they, for the first time, learned how greatly they had been deceived by David in respect of the value of John's estate; that Ann Clark had discovered the deed in a box in her possession; and that the value of the land on which the tannery was conducted was £3700 at John Clark's death, whereas it was valued to David at £2000. The bill also complained of the sale to David of another piece of John's land at an undervalue, but that part of the case has been given up. Beyond the foregoing statements, nothing was alleged to shew the fraud and misrepresentation of David, which was the sole equity of the bill.

It will be seen then that the case made by the bill rests upon David's statement as to the value of the estate, the belief of the others in that statement, his threatening to quarrel with them, his deterring them from taking legal advice, his reserve to them about disclaiming the trusts, their ignorance of the partnership

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deed, and the undervalue of the land. There is no charge that the partnership assets had in fact been undervalued, nor that David knew or believed their value to be more than he stated. On that point the plaintiffs only adduce the value given in the partnership deed. They do not allege that David concealed the deed. They do not suggest that there was any collusion between him and Balderson, or that Balderson was in any respect incompetent or neglectful of his duty. Balderson died in 1875, and his executor is a party to the suit, but no relief is prayed against him except the formal prayer for the administration of John Clark's estate.

If then the case had been proved exactly according to the facts stated in the bill, it is at least doubtful whether the charges of fraud and misrepresentation against David could be sustained. But the case proved is a different one.

It appears that Balderson was an experienced man of business employed by John Clark, and much trusted by him and all his family. Allan, the husband of John Clark's daughter Agnes, is described by the plaintiff Jane as a first-class man of business, and an honourable man. She adds that she and her sister Ann were on very good terms with him, saw him and his wife frequently, and consulted him as to John Clark's affairs. His relations with David appear to have been rather unfriendly. It may be added that Ann and Jane lived in the house where both the tannery and the saddlery businesses were carried on.

Such being the position of the family, the proposal that David should purchase the partnership business proceeded from Balderson. On what day this proposal was made does not appear. Indeed, the evidence is not clear as to the dates of the various steps in the negotiations, but they began some time before the 15th of April, and the terms were accepted before David's renunciation on the 1st of May.

On Balderson's proposal much bargaining took place between him and David as to price. Balderson employed one Dixon, who acted as a clerk in the tannery business, to make a valuation of the assets, which Dixon stated at £5240, and he took other steps to satisfy himself of their amount and value. As early as the 17th of April he consulted his solicitor Mr. Sedgefield, who continued to act for him until the completion of the sale. David consulted other advisers, first a Mr. Hanwell, whom he calls a law clerk, and afterwards Messrs. Bennett and Taylor, who took the opinion of counsel, which has been stated. Allan went to the tannery more than once to see things for himself. He denies this, but it is proved by other witnesses. He also consulted a solicitor, one Mr. Crisp, who, on the 24th of April had an interview with Mr. Sedgefield, and fully discussed the matter. Allan now says Mr. Crisp acted only as a friend; but he was paid by Allan for his services, and was treated by Sedgefield as a solicitor.

After carefully considering the state of the business, David made up his mind that £5000 was a full price to pay to his father's estate, and on that basis he offered to pay £1000 each to the other four children. Balderson tried to get better terms, and so did some of the family. Jane says they claimed £1600 each. Allan says that putting together John Clark's claim for the value of the original stock which was fixed by the partnership deed at £5300, and the sum of £2500 at which John Clark's will valued the land, he thought his wife should get £1500, and held out for that sum for a considerable time. But David declared that his father had placed an extravagant value on the land, and that the partnership had counterclaims against the £5300; and that his offer based on the value of £5000 must be taken as final. Balderson then had to consider the alternative of accepting David's offer, or winding up the business and carrying it into the market. Trade was very dull. Other tanneries were in the market. Balderson appears to have been afraid that the property would sell for very little, and moreover that, if David did not buy, the estate would get involved in litigation, and as he expressed himself to Allan, the property would be frittered away, and the girls would get nothing.

In these circumstances Balderson became very anxious that David's offer should be accepted. But he would not take the responsibility of doing so on himself. If the adult members of the family agreed, he would prove the will and conclude the bargain. If they were adverse, he openly told them he would not involve himself in a family quarrel, but would renounce probate. David was equally open. If his offer was accepted he would renounce probate, as indeed he was advised that he must do; if not, he would act as executor, or at all events would hold himself open so to act.

There was more than one family meeting held to discuss these matters, and at the last of these meetings, which probably took place on the 23rd of April, the affair was brought to a head. It is clear that the family acted under Balderson's advice. Jane says, "Balderson advised us to accept the offer, because he believed, as David said, that it would realize no more." Ann says, "Balderson told me it was advisable to accept £1000, as he thought it was not a saleable business." And again, "I took the £1000 because Balderson advised, and David said we could get no more." And Allan says, "Balderson assured me that he believed the offer was full value. It was not at once accepted. I, for my wife, accepted 27th or 28th April. Balderson was constantly seeing me about it in the interval." There is no trace in the evidence of that reliance on David's assurances upon which the equity of the bill is built.

The view taken of the transaction by their Lordships is this. It was one quite within the competence of Balderson as executor. It is not the less so because Balderson declined to clothe himself with the character of executor unless and until he could see a good chance of avoiding family quarrels and litigation. He need not have consulted the family, but as a prudent man he did so. David was not in any position of advantage except as surviving partner, which may have thrown upon him the obligation of giving full information. That Balderson, and Allan too, had free access to all available means of information is clear. It is equally clear that they were well advised, understood the bearings of the question, and struggled to enhance the price beyond what David would give. Nor can their Lordships find any trace of dishonesty or concealment on David's part from first to last.

The cause was heard before Mr. Justice Molesworth, who dismissed the bill without costs, except as against Balderson's executor, whose costs the plaintiffs were ordered to pay. It would seem that the prayer for the administration of John Clark's estate was treated as only incidental to the recovery of assets for that estate by setting aside the sale to David.

The plaintiffs then appealed to the Full Court, who set aside the sale as against them, directed accounts and administration of the partnership estate and of the estates of John and George Clark, and ordered David to pay all the costs both of the original hearing and of the appeal.

One of their reasons for making such a decree has been already disposed of. Having stated what is the case made and the case proved, their Lordships will advert briefly to the other reasons of the Supreme Court.

The learned Judges think that Balderson was placed in an unfair position by David's uncertainty whether or no he would renounce. But it is difficult to see how that circumstance placed Balderson at any disadvantage, and there is no evidence whatever to shew that any embarrassment did in fact arise from it. It was very natural that David should make his renunciation dependent on the acceptance of his proposal, the more so because Balderson declined to prove if the proposal was rejected, and their Lordships cannot appreciate the objections which have been raised to his so acting.

But then, the learned judges ask, was the sale fair? The contract, they say, may have been fair enough between Balderson and David, supposing them to have been dealing as strangers at arm's length, but unfair towards the testator's estate treating both parties as representatives of the estate and bound to protect the interests of the beneficiaries. And then they go on to shew the imperfect nature of Dixon's valuation (Exhibit H), and their reasons for thinking that more ought to have been coming to John Clark's estate from the partnership.

Now if the contract was fair as between Balderson and David, that is sufficient to maintain it, for it was within Balderson's competence, and David never held any fiduciary position. But their Lordships desire to add that notwithstanding a very ingenious argument at the bar, they cannot find from any evidence before them reason to think that David gave any great undervalue for the assets, even considered on the basis of a book valuation, while there is strong reason to think that the family got at least as much as they might have got by the only possible alternative, viz., winding-up and sale. It is possible and probable that David got a good bargain, which he turned to good account, especially as the course of trade turned strongly in his favour the next year; but it does not follow that the family got a bad bargain.

Finally, the Court say, the sale could have been successfully challenged on the ground of a misrepresentation of value of the testator's estate, made by both Balderson and David directly to the plaintiff Jane Lawrence, and indirectly to the plaintiff John Clark, as it would naturally be repeated to him by all his relatives who heard it, and was in effect repeated to him by Balderson when he received the securities, on which he was told that his share, £1000, was invested. Upon this it is sufficient to observe that from the filing of the bill down to the argument at this bar there has not been any suggestion or insinuation on the part of the plaintiffs that Balderson made any misrepresentation or behaved otherwise than with honesty and with zeal for the family interest.

Even if a more adverse view could be taken of the conduct of David or of Balderson, there would be much difficulty in giving relief to persons who have so long delayed to make their claims. The younger of the plaintiffs attained majority nearly twelve years before the bill was filed. He then received from Balderson what he knew was his share of the tannery business. The other plaintiff, who also duly received her share, was old enough to be present at the family discussions in 1866, and knew the whole story perfectly well. The only excuse given for action after such long delay is the discovery of the partnership deed. Supposing that suggestion to be well founded in fact, it is clear that the question how much would be coming to the estate of John Clark from the partnership must be determined by the state of the accounts in January, 1866, and not by the agreed amount at the date of the deed; and that the value of the land must be determined by the state of the market at the time of the sale and not by the agreed rent stated in the deed. But their Lordships cannot believe in the truth of the suggestion. The partnership deed was referred to and partially read at one of the family meetings attended by the plaintiff Jane. Allan, who was consulted by Jane, founded his claim on the contents of the partnership deed. It was not retained by David or by Balderson. It was handed to Ann by Balderson during the negotiations, he telling her that it was of no use, in which he was not far wrong. Ann kept it in her desk. In cross-examination she says:—"I knew it was there, but thought it was of no value. I looked among the papers, not particularly for a deed of partnership, but for what I then thought was a copy of a will. When I went lately I was looking for a deed of partnership. I remembered that I had such a thing. It was last year I got it, before August, 1881." Their Lordships cannot doubt that the purport of the deed was well known to the whole family, except possibly the plaintiff John, or that he knew that the partnership business purchased by his brother was carried on under some arrangement, the nature of which he might have learned at any moment by asking a question of his sisters or of his brother-in-law.

Even if the deed had turned out to have a direct and strong bearing on the question of value instead of a remote and weak one, its production under such circumstances as appear in this case would not justify the bringing of a suit after so long a lapse of time, during which the important testimony of Balderson was lost.

In the opinion of their Lordships this suit is one which ought not to have been brought. It was rightly dismissed by Mr. Justice Molesworth. The Full Court ought to have dismissed the appeal with costs. Their Lordships will now humbly advise Her Majesty to make an order to that effect. The costs of this appeal must be paid by the respondent John Clark, and the next friend of the respondent Jane Lawrence.

Solicitors for appellant: *Keen, Rogers, & Co.*
Solicitors for respondents: *Fowler & Perks.*

[PRIVY COUNCIL.]

THE QUEEN . . . . DEFENDANT;

AND

JOSEPH DOUTRE . . . . SUPPLIANT.

J. C.*
1884
June 18, 19;
July 12.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Quebec—Rights and Remedies of Quebec Barristers—Quantum meruit—Canada Petition of Right Act, 1876, *sect.* 19, *sub-s.* 3.

According to the law of Quebec, a member of the Bar is entitled, in the absence of special stipulation, to sue for and recover on a quantum meruit in respect of professional services rendered by him, and may lawfully contract for any rate of remuneration which is not contra bonos mores, or in violation of the rules of the Bar.

Where a member of the Bar of Lower Canada (Quebec) was retained by the Government as one of their counsel before the Fisheries Commission sitting in Nova Scotia, *held*, that in the absence of stipulation to the contrary, express or implied, he must be deemed to have been employed upon the usual terms according to which such services are rendered, and that his status in respect both of right and remedy was not affected either by the lex loci contractûs or the lex loci solutionis.

Held, further, that the Petition of Right, Canada, Act, 1876, sect. 19, sub-s. 3, does not in such case bar the remedy against the Crown by petition.

Kennedy v. *Brown* (13 C. B. (N.S.) 677) commented upon.

APPEAL from a judgment of the Supreme Court (May 13, 1882), affirming a judgment of the Exchequer Court, which awarded to the respondent the sum of $8000 and interest, in addition to $8000 previously paid for professional services in connection with the Fisheries Commission under the Treaty of Washington, rendered to the Government of Canada by the respondent as a Queen's Counsel.

The main point of law involved in the appeal was, whether a member of the Quebec Bar and one of Her Majesty's counsel, can by petition of right recover from Her Majesty upon a quantum meruit payment for services rendered in manner hereinafter appearing.

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* *Present*:—LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

The facts are stated in the judgment of their Lordships.

The respondent, on the 22nd of August, 1879, filed a petition under the Canada Petition of Right Act, 1876, and claimed from the Crown $10,000 for his services as counsel in addition to $8000 already paid.

The Attorney-General of Canada filed a statement of defence, and denied the respondent's right to recover more than the amount already paid, and denied his right to proceed by petition as aforesaid.

Fournier, J., on the 12th of January, 1881, decreed in favour of the respondent $8000 and interest from the 29th of August, 1879, the date when his petition was received by the Secretary of State of Canada, and costs.

The Supreme Court of Canada on appeal, consisting of six judges, was equally divided, with the result that the appeal was dismissed. The decisions of the learned judges proceeded upon different grounds.

Ritchie, C.J., held that the alleged agreement on which the petition was founded was made at Ottawa, in Ontario, for services to be performed in Nova Scotia, that therefore it was not subject to the law of Quebec, and that according to the law, both of Ontario and Nova Scotia, a barrister could not maintain an action for fees, and that therefore the petition did not lie, and the appeal should be allowed.

Strong, J., held, that the terms of the alleged agreement shewed only an honorary undertaking on the part of the Crown, that no action could be brought on this, and that therefore Mr. Doutre was entitled to recover only his actual expenses.

Gwynne, J., held, that by the law of Quebec counsel can recover for fees stipulated for by express agreement, that it was doubtful whether they could do so according to the law of Ontario, that the alleged agreement was governed by the law of Ontario, but that inasmuch as by the Petition of Right Act the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in England under similar circumstances, and by the law in force in England before 23 & 24 Vict. c. 34, counsel could not in England have enforced payment of fees against the Crown, the petition did not lie.

Fournier, J., adhered to his opinion expressed in the Court below, which was to the effect that a counsel could sue for fees under an agreement according to the law both of Quebec and Ontario, and that the alleged agreement entitled him to a reasonable remuneration, which the learned judge fixed at $8000, with interest from the 29th of August, 1879, only. The learned judge further held, that the alleged agreement was made under the authority of the 25th article of the Treaty of Washington and of the Canadian Act, 35 Vict. c. 2, which in his opinion incorporated the fishery articles of that treaty, and that the 25th article imposed on each of the high contracting parties the obligation to pay the counsel retained by them to prepare and support their case. The words of the 25th article of the treaty are as follows:—" Each of the high contracting parties shall pay its own commissioner, and agent, or counsel. All other expenses shall be defrayed by the two Governments in equal moieties."

Henry, J., agreed in substance with Fournier, J.

Taschereau, J., also agreed in substance with Fournier, J., except that he held that the employment of the respondent was governed by the law of Quebec only.

The Solicitor-General (*Sir F. Herschell*), and *Jeune*, for the appellant, contended that it was a question of the intention of the parties as to what law was applicable. The status of the respondent as a member of the Quebec Bar is not conclusive to shew that the law of Quebec was applicable. The question of the place of contract and of its performance must be looked to in order to shew such intention. The agreement (if any) was made at Ottawa, in the province of Ontario, for services to be performed at Halifax in the province of Nova Scotia. The case must therefore be determined by the law of Ontario, or Nova Scotia, and not of Quebec. See *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (1), followed in *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (2). Neither by the law of Ontario nor of Nova Scotia can a counsel maintain an action for his fees or for remuneration for his services; nor by the Quebec law can he sue for a quantum meruit. The intention of the parties was that they were dealing with an honorarium. That this was an agreement that could be sued upon is said upon the authority of *McDougall* v. *Campbell* (1), on which great doubt is thrown by the Supreme Court, and of *Beaudry* v. *Ouimet* (2), which applies to Quebec, where French law prevails. Even if the contract is made out as one to be enforced, the fair way of construing it is, that the balance payable was left by mutual arrangement to the discretion of the Government. Again, by sect. 8 of the Petition of Right Act, 1876 (Canada), the law of England prior to 23 & 24 Vict. c. 34 (Imperial) governs this case, and by such law a counsel cannot maintain any such action. In those provinces of Canada where the Common Law of England prevails, members of the Canada Bar cannot, unless authorized to do so by statute, make a valid agreement as to remuneration, or sue for their fees. Reference was made to *Kennedy* v. *Brown* (3).

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(1) 10 Q. B. D. 521, 529.

(2) 12 Q. B. D. 589.

Fullarton, for the respondent, contended that his rights and remedies were governed by the law of Quebec, and the rules and practice of the legal profession in Quebec; because that law is the only law by which the respondent's status as a barrister is given and regulated. If professionally retained, it can only be as a Quebec barrister; if not professionally retained, he is under no disability to sue for remuneration. The respondent is a solicitor as well as a barrister; see Statute of Quebec, 1864; and by Quebec law he can sue on a quantum meruit. And even if the lex loci contractûs is to decide this question, Quebec is such locus, for the offer was received and accepted there. If Ontario is the locus contractûs, and the respondent's right is regulated by that law, it equally confers the right to sue: see *McDougall* v. *Campbell* (4), which practically overrules the view taken by Robinson, C.J., in *Baldwin* v. *Montgomery* (5), and although its facts are peculiar they were such as to raise the point for decision, and it was decided. The New Brunswick decisions are based entirely on the supposed effect of the Common Law of England in that province, and they are wrongly decided. If, on the other hand

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(1) 41 U. C. C. B. 332, 342, 345.

(2) 9 L. C. Jurist, 158.

(3) 13 C. B. (N.S.) 677.

(4) 41 U. C. Q. B. 332.

(5) 1 U. C. Q. B. 284.

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the lex loci solutionis is to rule, Quebec is such locus, for it is the place where the payment if due is to be made and where much of the work was done. Even if the law of Nova Scotia is to rule, there is no law or custom in Nova Scotia restraining a barrister from suing for his fees. The Common Law of England does not forbid contracting or suing for fees for advocacy in public Courts, except to members of the English Bar as such. Solicitors can sue for advocacy in all Courts where they have audience. In all the provinces of Canada the functions of barristers and solicitors are united in the same person; and the rules of the English Bar do not apply there. The balance due is not at the discretion of the Government, is not a gratuity: *Jewry* v. *Busk* (1); *Bryant* v. *Flight* (2); *Taylor* v. *Brewer* (3): *Roberts* v. *Smith* (4); *Earl of Mansfield* v. *Scott* (5).

Jeune replied.

The judgment of their Lordships was delivered by

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July 12.

LORD WATSON:—

On the 1st of October, 1875, the Government of Canada addressed and sent to the respondent, Joseph Doutre, a letter, signed by Mr. Bernard, the Deputy Minister of Justice, in the following terms:—

"Sir,—The Minister of Justice desires me to state that the Government being desirous to retain counsel to act for them upon the proceedings in connection with the Fishery Commission to sit at Halifax under the Treaty of Washington, he will be glad to avail himself of your services as one of such counsel, in conjunction with Messrs. Samuel R. Thomson, Q.C., and Robert L. Weatherbee, barrister, of Halifax. The Minister will be glad to know whether you are willing to act in that capacity, and in that case to place you in communication with the Department of Marine and Fisheries upon the subject."

Upon receipt of this letter, the respondent wrote, in reply, that he would act as requested.

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(1) 5 Taunt. 302.

(2) 5 M. & W. 114.

(3) 1 M. & S. 290.

(4) 4 H. & N. 315; 28 L. J. (Exch.) 164.

(5) 1 C. & F. 319.

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The respondent is a member of the Quebec section of a body of legal practitioners incorporated by cap. 72 of the Consolidated Statutes of Lower Canada, under the title of the "Bar of Lower Canada." By the terms of the statute, each member of the Bar is admitted to practise as "advocate, barrister, attorney, solicitor, and proctor at law;" and no person, except a member of the Bar, duly admitted, is entitled to conduct business, in any of these capacities, before the Courts of Lower Canada. Every member of the Bar must be registered in the district where he intends to practise; and he becomes answerable for his conduct to the council of that district, being liable, in case of his offending against professional rule or etiquette, to censure or to suspension from office for any period not exceeding a twelvemonth.

It is not matter of dispute that, according to the law of Quebec, a member of the Bar is entitled, in the absence of special stipulation, to sue for and recover a quantum meruit, in respect of professional services rendered by him, and that he may lawfully contract for any rate of remuneration which is not contra bonos mores, or in violation of the rules of the Bar. But it is asserted for the appellant that, by the law of Ontario, the province in which Ottawa, the seat of Government, is situated, a counsel cannot sue for his fees, and that he is under the same disability according to the law of Nova Scotia, where, according to article 23 of the treaty, the commission was to meet. In support of that contention, counsel for the appellant referred to the opinion of Harrison, C.J., in *McDougall* v. *Campbell* (1), as correctly expressing the law of Ontario; but they mainly relied upon the proposition that, in those provinces of the Dominion where the common law of England prevails, members of the Canadian Bar can neither have action for their fees nor make a valid agreement as to their remuneration unless that right has been conferred upon them by statute. In these circumstances, it was maintained that the right of the respondent to sue for his fees must depend either upon the law of Ottawa, the locus contractûs, or upon the law of Nova Scotia, the locus solutionis, and that in neither case was any suit competent to him.

Were it necessary to decide all the points thus taken by the appellant, questions of much nicety would arise. It is by no means clear either that Ottawa was the locus contractûs, or that Nova Scotia was, in a strict sense, the locus solutionis. It is at least a plausible view of the case that the contract was completed in Quebec at the moment of time when the respondent posted his letter accepting the employment offered him by the Minister of Justice. On the other hand, although the commission was to sit at Halifax, it is perfectly plain that the work expected of the respondent, and actually performed by him, was by no means confined to advocacy of the Dominion claims during the sittings of the commission. His employment was not limited to what would, in this country, be considered the proper duties of a counsel, but embraced the work of an agent or solicitor; in point of fact he was employed to prepare the case of the Dominion Government, as well as to plead in their behalf. That such was the understanding of both parties may be inferred from the known professional status of the respondent, as well as from the fact that, in pursuance of the so-called retainer of the 1st of October, 1875, the respondent had papers sent him, and was engaged at Quebec during eighteen months, with occasional visits to Ottawa, in collecting and putting in shape materials for framing and supporting the claim which was to be urged before the commission.

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(1) 41 U. C. Q. B. 332.

Then, as regards the other questions of law raised by the appellant, there is much difficulty. Their Lordships are willing to assume that the law of England, so far as it concerns the right of the Bar of England to sue or make agreements for payment of their fees, was rightly applied in the case of *Kennedy* v. *Brown* (1); but they are not prepared to accept all the reasons which were assigned for that decision in the judgment of Erle, C.J. It appears to them that the decision may be supported by usage and the peculiar constitution of the English Bar, without attempting to rest it upon general considerations of public policy. Even if these considerations were admitted, their Lordships entertain serious doubts whether, in an English colony where the common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the Bar alone excepted, can recover their fees by an action at law.

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(1) 13 C. B. (N.S.) 677.

But it is unnecessary, in the view which their Lordships take of this case, to decide any of these questions which were raised by the argument for the appellant. The right of the respondent to sue for remuneration does not appear to them to depend either upon the law of the place where the employment was given, or upon the law of the locality within which it was to be performed. When an advocate or other skilled practitioner is, by law and the custom of his profession, entitled to claim and recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, express or implied, be held to have employed him upon the usual terms according to which such services are rendered. That is the implied condition of every contract of employment which is silent as to remuneration; and it is a condition dependent upon the professional status and rights of the person employed, and not upon the law of the place where his services are to be given, so long as he is employed in his professional capacity. A member of the Bar of England, in accordance with the law of that country and the rules of the profession to which he belongs, renders, and professes to render, services of a purely honorary character. If, in his professional capacity as an English barrister, he accepted a retainer to appear and plead before commissioners or arbitrators in a foreign country, by whose law counsel practising in its regular courts were permitted to have suit for their fees, that would not give him a right of action for his honoraria. His client would have a conclusive defence to such an action, on the ground that he was employed as a member of the English Bar, and, by necessary implication, upon the same terms as to remuneration upon which members of that Bar are understood to practise.

The respondent is a member of the Quebec section of the Bar of Lower Canada, and it was in that capacity that he was retained by the Government as one of their counsel before the Fisheries Commission. The respondent has the rank of Queen's Counsel conferred on him by patent; but that circumstance does not appear to their Lordships to affect the present case. It gave him a certain precedence in a question with other members of his Bar, but it made no change upon the duties and obligations incumbent on him as a practising member of the Bar, or upon his privileges as such, including the right to sue for his fees. The retaining letter of the 1st of October, 1875, makes no mention of fees, and their Lordships are accordingly of opinion that it must be held to have been an implied condition of the employment thereby offered that the respondent was to be remunerated for his services upon the same terms on which these services were rendered to clients in Quebec. The respondent was engaged and undertook to go to Halifax as a Quebec counsel, subject to the same rules of his Bar, by which his conduct as a lawyer was regulated in Quebec, and it would be a strange result if, retaining his status and performing his work as a member of the Quebec Bar, he was nevertheless to be stripped of the privileges attaching to that status as soon as he entered the province of Nova Scotia.

A few weeks after his acceptance of the letter of the 1st of October, 1875, the respondent received a retaining fee of $1000; and thereafter the subject of counsel's remuneration does not appear to have been considered until May, 1877, when it was discussed, at Ottawa, in the course of one or two personal interviews between Sir Albert Smith, Minister of Marine and Fisheries in the Government of Canada, and the respondent. The parties are widely at variance in regard to what actually passed on the occasion of these interviews. The allegation made by the respondent in his petition is,—

"That, on the eve of his leaving his home for Halifax, to wit, in May, 1877, your petitioner made with the Department of Marine and Fisheries a temporary and provisional arrangement, under which your petitioner should be paid $1000 a month for current expenses while in Halifax, leaving the final settlement of fees and expenses to be arranged after the closing of the Commission."

On the other hand, it is alleged in the defence filed for the appellant,—

"That the arrangement made with the suppliant, referred to in his petition, under which he was to be paid $1000 a month while in Halifax, was not a temporary and provisional arrangement as alleged, but that the $1000 a month was, with other moneys previously paid to the suppliant, to be accepted by him in full for his services and expenses."

The Commission met at Halifax on the 16th of June, and brought its labours to a close on the 23rd of November, 1877, having sat, with occasional adjournments, for a period of five months and seven days. In addition to the retaining fee already mentioned, the respondent received a refresher of $1000, and also six monthly payments of $1000 each, during the sitting of of the Commission, making a sum total of $8000. According to the respondent, these sums were paid him to account of his remuneration, the precise amount of his fees and expenses being left for adjustment subsequently. According to the appellant, they were paid to and received by the respondent as in full of his whole claim for fees and expenses. Both parties are agreed that in May, 1877, it was arranged that these sums (to the extent of $7000) should be paid to the respondent; but they differ as to the footing upon which they were to be paid.

Being of opinion that, by the terms of his employment in 1875, the respondent was entitled to a quantum meruit in respect of the services which might be required of him, their Lordships think that it lies with the appellant to make out that the respondent's original right to remuneration was varied by subsequent agreement; and they have also come to the conclusion that the appellant has failed to establish the existence of such an agreement. The evidence upon this point, which need not be referred to in detail, is very unsatisfactory. It is abundantly plain that the impression honestly derived by Sir Albert Smith, from his interviews with the respondent in May, 1877, was, that the respondent had agreed to accept a refresher of $1000, and a payment of the same amount monthly, during the sittings of the Commission, as in full of all claims for remuneration. But in order to alter the then existing rights of the respondent, it is not enough for the appellant to shew that such was the impression created in the mind of Sir Albert Smith; he must also prove that the terms of the arrangement, as understood by Sir Albert Smith, were understood in the same sense, and were assented to by the respondent. But the respondent swears distinctly that he understood and believed the arrangement to be provisional merely; that its object was to fix the sums which were to be paid him to account leaving the balance payable to him for after adjustment, and there are circumstances proved in the case which seem to establish beyond question that the respondent at the time sincerely entertained that belief. Then the evidence of Mr. Whitcher, the Commissioner of Fisheries for Canada, and the only third party present at these interviews, is not only very inconclusive, but what he does state, as to the language actually used by the principal parties to the arrangement then made, tends to support the respondent's understanding of its terms. In that state of the evidence, their Lordships are unable to hold that the appellant has satisfied the onus incumbent on him of proving the new arrangement alleged in his defence.

In the Courts below, whilst the learned judges were equally divided as to the result of the case, there was a remarkable diversity of judicial opinion in regard to the law applicable to its decision. The cause was tried before Mr. Justice Fournier, who, on the 12th of January, 1881, gave judgment in favour of the respondent, and fixed the amount of fees and expenses still remaining due to him, in remuneration of his services, at $8000; and it is not maintained that the amount awarded by the learned judge is excessive, if the respondent has a right of action, and that right is not barred by the alleged arrangement of May, 1877. The cause was then taken, by appeal, before the Supreme Court of Canada, who gave their judgment upon the 13th of May, 1882. Chief Justice Ritchie and Justices Strong and Gwynne were in favour of allowing the appeal; but Mr. Justice Fournier, who was a member of the Full Court, adhered to the view which he had taken as judge of first instance, and Justices Henry and Taschereau, in substance, agreed with him. In consequence of this equal division of opinion in the Supreme Court, the order appealed from was confirmed, and the appeal dismissed with costs.

Their Lordships do not consider it necessary to notice the great variety of reasons assigned by the learned judges of the Supreme Court, in support of the views which were severally adopted by them, with the exception of one point raised in the judgment of Mr. Justice Gwynne. That point is deserving of notice for this reason, that if the opinion of the learned judge, which is based upon the provisions of the Petition of Right Act for Canada, be well founded, the respondent, though he might have sued for recovery of his fees from any subject, could not recover them by petition from the Crown. By a pardonable error Mr. Justice Gwynne refers to the Act of 1875, instead of the Petition of Right Canada Act, 1876 (39 Vict. c. 27), which repealed the statute of the previous year. Sect. 19 (3), which is identical in expression with the similar section of the repealed Act, provides that:—

Sect. 19: "Nothing contained in this Act shall—

"(3.) Give to the subject any remedy against the Crown (*a*) in any case in which he would not have been entitled to such remedy in England, under similar circumstances, by the laws in force prior to the passing of the Imperial statute 23 & 24 Vict. c. 34."

The learned judge seems to hold that these provisions place a Quebec lawyer on precisely the same footing as an English barrister, so far as regards his right to proceed against the Crown for recovery of his fees. But it appears to their Lordships that the process of reasoning by which the learned judge arrives at that conclusion confounds two things which are essentially different, "right" and "remedy." The statute does not say that a Quebec lawyer shall, in all cases, have only the same right against the Crown as a member of the English Bar. What it does enact is, that no subject in Canada shall be entitled to the "remedy" provided unless he has a legal claim, such as could have been enforced by petition of right in England, prior to the Imperial Act of 23 & 24 Vict. It is impossible to hold that a member of the Quebec Bar who, by law and practice, is permitted to sue for his fees, when he seeks his remedy against the Crown, under the Canadian Act of 1876, has no such legal claim, and that he sues under circumstances similar to those in which an English barrister is placed, who, neither by the usage of his profession, nor the law of his domicile, can maintain any action for his fees.

Their Lordships will therefore, humbly advise Her Majesty to affirm the judgment of the Courts below, and to dismiss the appeal, with costs.

Solicitors for appellant: *Bompas, Bischoff, & Dodgson.*

Solicitors for respondent: *Simpson, Hammond, & Co.*

[HOUSE OF LORDS.]

H. L. (E.)
1884
April 4.

THE JUSTICES OF THE PEACE FOR MIDDLESEX . . . . APPELLANTS;

AND

THE QUEEN (ON THE PROSECUTION OF THE LORDS COMMISSIONERS OF HER MAJESTY'S TREASURY) . . . . RESPONDENT.

Prison—Governor—Superannuation—Compensation Allowance—Special Minute—Superannuation Act 1859 (22 *Vict. c.* 26), *ss.* 2, 4, 7—*Prison Act* 1877 (40 *&* 41 *Vict. c.* 21) *s.* 36.

At the time when the Prison Act 1877 (40 & 41 Vict. c. 21) came into force C. was the governor of a prison which by that Act was transferred to the Home Secretary. Up to that time the county justices had been the prison authority. Soon after the Act came into force C. retired, and the Lords Commissioners of the Treasury awarded him an annuity calculated upon $\frac{38}{60}$ths of his salary and emoluments, or $\frac{1}{60}$th per annum for thirty-eight years; viz. $\frac{23}{60}$ths for his twenty-three years of actual service under the county justices; with $\frac{10}{60}$ths added for ten years because he had retired for the purpose of facilitating improvements in the organisation of the prison department; and $\frac{5}{60}$ths added for five years under sect. 4 of the Superannuation Act 1859 (22 Vict. c. 26). The Commissioners apportioned $\frac{28}{60}$ths of the annuity to be paid by the county justices out of the county rates, leaving the $\frac{10}{60}$ths to be paid out of grants provided by Parliament. C. was under sixty years of age, and was not incapacitated by illness or otherwise. The Commissioners did not make or lay before Parliament a special minute within the meaning of sect. 7 of the Superannuation Act 1859:—

Held, affirming the decision of the Court of Appeal, that the provision in sect. 7 of the Superannuation Act 1859 as to a special minute was directory only; that the Commissioners had power to make the award under the Prison Act 1877 s. 36, and the Superannuation Act 1859 ss. 2, 4, and 7; and that the county justices were liable for the proportion charged upon them.

APPEAL from an order of the Court of Appeal.

The special case is set out in the report of the decision of the Court of Appeal (1).

Briefly, the material facts were as follows:—

Up to the 1st of April 1878 (the date of the coming into operation of the Prison Act 1877) the Middlesex justices were the prison authority in respect of Coldbath Fields Prison. After that date the prison with the officers was taken over by the Home Secretary and the Prison Commissioners. Colonel Colvill was appointed by the justices governor of the prison in December 1854, and remained governor till the 1st of August 1878, when he retired. At his retirement he was under sixty years of age, and was not incapacitated by illness or otherwise, but he retired for the purpose of facilitating improvements in the organisation of the prison department.

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(1) 11 Q. B. D. 656.

Upon his retirement the Lords Commissioners of the Treasury awarded him an annuity of £582 13*s.* 4*d.* payable from the 1st of August 1878, apportioning it thus: £429 6*s.* 8*d.* to be borne by the Middlesex justices, £153 6*s.* 8*d.* by grants provided by Parliament.

From the correspondence (which was set out in the appendix to the special case) the annuity appeared to have been calculated upon the following principle. Colonel Colvill's salary and emoluments being £920 per annum, $\frac{38}{60}$ths (or $\frac{1}{60}$th per annum) amounted to £582 13*s.* 4*d.*; of which $\frac{23}{60}$ths represented twenty-three years actual service; $\frac{10}{60}$ths represented ten years added on account of his retiring from the public service for the purpose of facilitating improvements in the organisation of the prison department, and $\frac{5}{60}$ths represented five years added under s. 4 of the Superannuation Act 1859. The $\frac{10}{60}$ths (or £153 6*s.* 8*d.*) were payable out of grants provided by Parliament alone, and no part of this was charged on the justices.

The question was whether the justices ought to discharge out of the county rates the portions so charged upon them.

The Queen's Bench Division (Field and Stephen JJ.) held that the justices were liable, and made absolute a rule for a mandamus to them to pay their proportion.

The Court of Appeal (Brett M.R. and Lindley L.J.) affirmed this decision (1).

The following enactments are material:—

The Prison Act 1877 (40 & 41 Vict. c. 21) s. 36: "If at any time after the commencement of this Act it appears to the

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(1) 11 Q. B. D. 656.

Treasury that any existing officer of a prison has been in the prison service for not less than twenty years, and is not less than sixty years of age, or that any existing officer of a prison has become incapable, from confirmed sickness, age, or infirmity, or injury received in actual execution of his duty, of executing his office in person, and such sickness, age, infirmity, or injury is certified by a medical certificate, and there shall be a report of the Prison Commissioners testifying to his good conduct during his period of service under them, and recommending a grant to be made to him, the Treasury may grant to such officer, having regard to his length of prison service, an annuity by way of superannuation allowance not exceeding two-thirds of his salary and emoluments, or a gratuity not exceeding the amount of his salary and emoluments for one year.

"If any office in any prison to which this Act applies is abolished or any officer is retired or removed, any existing officer of a prison who, by reason of such abolition, retirement, or removal is deprived of any salary or emoluments, shall be dealt with in manner provided by the Superannuation Act 1859 with respect to a person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organisation of the department to which he belongs.

"'Prison service,' for the purposes of this section, means, as respects the period before the commencement of this Act, service in a particular prison, or in the prisons of the same authority, transferred to the Secretary of State, and as respects the period after the commencement of this Act, service in any such prison or in any other prison transferred to the Secretary of State under this Act.

"Any annuity by way of superannuation allowance or gratuity granted under this section shall be apportioned between the period of service before the commencement of this Act, and the period of service after the commencement of this Act; and so much of such annuity or allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid, but without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department, shall be paid by the prison authority of the prison in which the officer to whom such annuity or allowance is granted was serving at the date of the commencement of this Act out of rates which at or immediately before the commencement of this Act were applicable to the payment of the salary of such officer, and the residue shall be paid out of moneys provided by Parliament."

Sect. 53: "Nothing in this Act contained shall entitle any existing officer of a prison to any superannuation or other allowance, the conditions of whose office would not have entitled him to superannuation or other allowance under the Prison Act 1865."

The Superannuation Act 1859 (22 Vict. c. 26)—

Sect. 2: "Subject to the exceptions and provisions hereinafter contained, the superannuation allowance to be granted after the commencement of this Act to persons who shall have served in an established capacity in the permanent Civil Service of the State, whether their remuneration be computed by day pay, weekly wages, or annual salary, and for whom provision shall not otherwise have been made by Act of Parliament, or who may not be especially excepted by the authority of Parliament, shall be as follows; (that is to say,)

To any person who shall have served ten years and upwards, and under eleven years, an annual allowance of ten-sixtieths of the annual salary and emoluments of his office:

For eleven years, and under twelve years, an annual allowance of eleven-sixtieths of such salary and emoluments:

And in like manner a further addition to the annual allowance of one sixtieth in respect of each additional year of such service, until the completion of a period of service of forty years, when the annual allowance of forty-sixtieths may be granted; and no addition shall be made in respect of any service beyond forty years:

Provided always, that if any question should arise in any department of the public service as to the claim of any person or class of persons for superannuation under this clause, it shall be referred to the Commissioners of the Treasury, whose decision shall be final."

Sect. 4: "It shall be lawful for the Commissioners of the Treasury, from time to time, by any order or warrant, to declare that for the due and efficient discharge of the duties of any office or class of offices to be specified in such order or warrant, professional or other peculiar qualifications, not ordinarily to be acquired in the public service, are required, and that it is for the interest of the public that persons should be appointed thereto at an age exceeding that at which public service ordinarily begins; and by the same or any other order or warrant to direct that when any person now holding or who may hereafter be appointed to such office or any of such class of offices shall retire from the public service, a number of years not exceeding twenty, to be specified in the said order or warrant shall, in computing the amount of superannuation allowance which may be granted to him under the foregoing section of this Act, be added to the number of years during which he may have actually served, and also to direct that in respect of such office or class of offices the period of service required to entitle the holders to superannuation may be a period less than ten years, to be specified in the order or warrant; and also to direct that, in respect of such office or class of offices, the holder may be entitled to superannuation, though he may not hold his appointment directly from the Crown, and may not have entered the service with a certificate from the Civil Service Commissioners: Provided always, that every order or warrant made under this enactment shall be laid before Parliament."

Sect. 7: "It shall be lawful for the Commissioners of the Treasury to grant to any person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organisation of the department to which he belongs, by which greater efficiency and economy can be effected, such special annual allowance by way of compensation as on a full consideration of the circumstances of the case may seem to the said Commissioners to be a reasonable and just compensation for the loss of office; and if the compensation shall exceed the amount to which such person would have been entitled under the scale of superannuation provided by this Act if ten years were added to the number of years which he may have actually served, such allowance shall be granted by special minute, stating the special grounds for granting such allowance, which minute shall be laid before Parliament, and no such allowance shall exceed two-thirds of the salary and emoluments of the office."

The Commissioners of the Treasury had made, under sect. 4, an order or warrant (which was set out in the Appendix to the Special Case), dated the 24th of August 1860, under which governors of prisons were to be placed in the third class mentioned in the Treasury minute of the 14th of June 1859, and in the case of persons coming within this class, five years were (sect. 4), in computing the amount of superannuation allowance which might be granted to them, to be added to the number of years which they might have actually served. No other document of a similar nature was executed.

No special minute within the meaning of the 7th section of the Superannuation Act 1859 was ever made or laid before Parliament with reference to Colonel Colvill or his office.

April 1, 3, 4. *R. S. Wright* (*J. C. Hannen* with him) for the appellants:—

The Commissioners, in making the award and apportionment, claimed to act under the authority of the 36th section of the Prison Act 1877; and the question is whether, as against the appellants, the award and apportionment were authorized by that Act. It follows from the facts as found in the special case, and it was not disputed, that the Treasury had no power to award to Colonel Colvill any annuity under the provisions of the first paragraph of the 36th section of the Prison Act 1877 relating to "annuities by way of superannuation allowance," inasmuch as he was not qualified for a superannuation allowance by age or incapacity. The annuity must, therefore, be taken to have been awarded under the power given by the second paragraph of the 36th section: that is to say, not as "an annuity by way of super-

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annuation allowance," but as a "compensation" under the 7th section of the Superannuation Act 1859 (22 Vict. c. 26) in respect of removal from office for the purpose of facilitating improvements in the organisation of the general prison system of the country.

The Treasury, in apportioning the amount of the compensation between the county of Middlesex and the Treasury, claimed to act under the authority of the fourth paragraph of the 36th section. Under the guise of compensation for loss of office they have awarded a "superannuation allowance," which they had no power to do, for the following reasons:

First, the provisions of the 4th paragraph apply only to "annuities by way of superannuation allowance" and not to "compensation;" and it is not the meaning of the Act that the local authority are to be made to bear any portion of the cost of compensating a prison officer who is removed, as in the present case, only for the purpose of facilitating improvements, or economy, in the general prison administration of the country at large.

Throughout the Acts known as the "Superannuation Acts," viz.: (1834) 4 & 5 Will. 4 c. 24; (1859) 22 Vict. c. 26; (1865) 28 & 29 Vict. c. 113; (1869) 32 & 33 Vict. c. 60; (1871) 34 & 35 Vict. c. 36; (1872) 35 & 36 Vict. c. 83; (1873) 36 Vict. c. 23; (1876) 39 & 40 Vict. c. 53; (1876) 39 & 40 Vict. c. 68; (1876) 39 & 40 Vict. c. 73; (1878) 41 & 42 Vict. c. 53; (1878) 41 & 42 Vict. c. 63; a distinction is made and established between "superannuation" and "compensation;" and the language and purport of this fourth paragraph and in particular the first words, clearly express an intention to adopt this distinction, and to limit the operation of that paragraph to superannuations as distinguished from "compensations." This distinction is observed throughout the 36th and also in the 53rd section, and the words used at the commencement of the fourth paragraph of the 36th section "any annuity by way of superannuation allowance or gratuity" are apt, and technically accurate, in themselves and appear to have been expressly chosen for the purpose of limiting the application of that paragraph to "superannuations" as distinguished from "compensation."

The respondent's contention was that the introductory words "an annuity by way of superannuation allowance or gratuity granted under this Act" ought to be construed as if they had been "any annuity or gratuity granted under this Act" or "any annuity by way of superannuation or compensation allowance," in order to give effect to the exception contained in the subsequent words "but without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department." But the language of the exception is wholly inappropriate to describe any part of an annuity granted exclusively by way of compensation under the 7th section of the Superannuation Act 1859. If this had been the intention of the legislature, such intention would naturally have been expressed in one or other of the forms above suggested. Full effect can be given to all parts of the 4th paragraph by construing the exception to refer to the case of an officer who, although qualified for superannuation by length of service, is fit for further service, and does not voluntarily retire, but is removed by abolition of his office, or for facilitating the organisation of the department, in which case it would be just that he should receive some compensation in addition to his superannuation. In any case the language of the exception is too obscure to have the effect of enlarging the precise terms of the introductory words, especially when the result of such a construction would be to create a new burden to which the county rates were not subject before 1877, and to throw on a particular county the cost of an improvement made for the benefit of the whole country.

Secondly, under the Prison Acts of 1823 and 1842, which were in force at the date of Colonel Colvill's appointment, and the operation of which is preserved with respect to him by the 79th section of the Prison Act 1865, not only was he not entitled to a pension or other allowance, but the justices had no power to grant him any such pension or allowance except in the event of incapacitation; if any effect is to be given to sect. 53 of the Prison Act 1877, that section must be held to have precluded the Treasury from granting to Colonel Colvill any superannuation, or other allowance, chargeable on the county rate.

Thirdly, the order or warrant of 1860 (set out in the appendix to the special case) does not apply to governors of any prisons other than convict prisons, which were the only kind of Government prisons existing at the date of the making of the order or warrant; and as the special case finds (paragraph 10) that no other order or warrant relating to governors of prisons was ever issued under, or for the purposes of, the 4th section of the Superannuation Act 1859, the Treasury had no power to add five years to Colonel Colvill's term of service, or to apportion against the appellants any sum in respect of the five years added. So far then, at least, the award is bad.

Fourthly, as it appears from the special case that Colonel Colvill's office was not abolished and that he was not retired or removed from his office, no compensation could be granted to him under the 2nd paragraph of the 36th section.

Lastly, the 7th section of the Superannuation Act 1859 requires a special minute to be made and laid before Parliament whenever ten years are added. The making and laying the minute before Parliament is a condition precedent to the validity of the award, and as this was not done the award is wholly bad; and this point alone is fatal to the respondent's case.

Sir F. Herschell S.G. and *Danckwerts* (*Sir H. James A.G.* with them) for the respondent:—

The justices are not charged with anything more than the compensation earned under the Superannuation Act 1859 for service under the former prison authority; i.e., for twenty-three years actual service, with five years added under sect. 4 of that Act. Nothing was awarded to him for service after the 1st of April 1878, the date when the Prison Act 1877 came into force, and the justices are not charged with any part of the $\frac{10}{60}$ths for the added ten years. Therefore they cannot object to the ten years.

As to the last point argued, no special minute was required under sect. 7 of the Superannuation Act 1859, because the compensation does not "exceed the amount to which Colonel Colvill would have been entitled," &c., within that section. A special minute is merely directed to the Lords of the Treasury, and is for the information of Parliament; and the words in sect. 7 are directory merely, not imperative. As to the appellant's third point, convict prisons were not the only prisons under Government existing at the time of making the order or warrant. There was the Queen's Bench Prison.

[For their arguments upon the other points it is sufficient to refer to the judgments of the Court of Appeal, which in substance they adopted.]

R. S. Wright, in reply, insisted again upon the point as to the absence of a special minute.

EARL OF SELBORNE L.C.:—

My Lords, perhaps it may be convenient that your Lordships' attention should first be directed to the last point which has been raised under the 7th section of the Act of 1859, because, if that point were tenable, it would be entirely fatal both to the grant of this pension to the officer now immediately concerned and, as far as I can judge, to all the grants which have been made to any officers of the same class—a most serious consequence. If your Lordships were obliged to arrive at that result, nobody can tell how far-reaching it might be in its operation and effect as to other cases also ; and the reluctance which your Lordships would naturally feel to adopt that view must be increased by the fact, that though the point does not seem to have been lost sight of either when the special case was settled or when the argument took place before the Court of Appeal, yet it was one which the justices were, obviously and for reasons creditable to themselves, most unwilling to press, which they rather endeavoured to use as putting a kind of compulsion upon the Court to yield to their views upon a totally different point, and which therefore was rather a subsidiary portion of their argument than the main fundamental ground of it; and yet it is evident that if the objection be tenable it is a fundamental objection.

Now, after consideration and hearing what has been said on both sides, your Lordships, I think, are agreed that you may safely hold what is said here about the necessity of a special minute to be directory, and not in the nature of a condition precedent on which the validity of the grant must essentially depend ;

and, I may add, directory for reasons which apply not to anything which has been actually granted in the present case, or in any case exactly like it, but which would apply to any excess beyond that which in the present case has been granted.

I cannot but refer, upon this subject, to what appears in the documents, which are part of the special case, as to the practice of the Treasury. This particular grant was announced, not alone, but with other grants under the Prison Act of 1877, by a Treasury letter addressed to the Secretary of State on the 2nd of August 1878, in which the proper officer of the Treasury writes: "I am directed by the Lords Commissioners of Her Majesty's Treasury to acquaint you, for the information of the Secretary of State, that my Lords have been pleased to award to the prison officers mentioned overleaf the pensions set against their respective names apportioned between the rates out of which their salaries were payable immediately before the 1st of April 1878, and moneys voted by Parliament, and I am to state that my Lords have directed the Paymaster-General to pay the portions of the pensions payable out of voted moneys from the dates specified in each case." And, some correspondence having followed with the county officers, there is a subsequent letter on the 9th of January 1879 from the Treasury to the Secretary of State, in which this is said: "The letter announcing the pension is the only evidence of the action of the board in granting it which has ever been given or, as my Lords believe, has ever been asked for, since pensions began to be granted. The Comptroller and Auditor-General, an authority not open to the charge of being too easily satisfied, accepts these Treasury letters as sufficient vouchers for all pensions payable out of public moneys. It is not immaterial to notice, that, when pensions of a special character are to be granted, the legislature has provided that copies of the minutes granting such pensions shall be laid before Parliament (see 22 Vict. c. 26 ss. 4, 7, 9). Such an express provision, coupled with uniform practice from the time of this statute, not to mention the earlier statute of 1834 which it partly embodies, sufficiently proves that the intention of the legislature was to leave the Treasury to settle the routine of procedure in other cases. The Prison Act of 1877 contains no directions to the Treasury as to the process of awarding pensions beyond such as may be gathered from the word 'award' in sect. 36 read in connection with the Superannuation Act of 1859, to which my Lords are referred for certain purposes in that same section. My Lords consider that it would be a very serious thing for a public department to depart from its procedure in the transaction of its business after so long a sanction by usage, nor can they consent to do so. In addressing their awards to the Home Office and not to the late prison authorities my Lords have believed themselves to be complying with the view of the Secretary of State," and so on.

That, I think, seems to shew that the view upon which the Treasury have acted, and all officers have acted, upon which pensions have been actually paid and the payments passed through the Audit Office, has been this, that, unless when an exceptional reason has required information to be given to Parliament, the ordinary procedure should be followed in all respects, and that this ordinary procedure amounts to a grant and an award of a pension; and when we bear that in mind, as we properly may, in connection with the language of the clause, I think we can see our way to distinguish between that which operates as a grant to the pensioner, and that which ought to be done by the granting authority for the purpose of giving information to Parliament in certain cases. The clause (sect. 7 of the Superannuation Act 1859) begins with the words, "It shall be lawful for the Commissioners of the Treasury to grant to any person retiring or removed from the public service in consequence of the abolition of his office," and so forth, "such special annual allowance by way of compensation," as they consider proper. I need not follow the terms of the clause further at this moment.

Now we must consider the question as between the Treasury and the grantee. It would be a most serious thing if he should suffer for any neglect of those things which are to be done in any particular case by the Commissioners of the Treasury, of which he has no knowledge, for which he has no responsibility, and over which he can have no control. The correspondence which I have read shews distinctly, that as a general rule the uniform practice of all the Government departments is to consider the grants or the awards of pensions as made in the manner in which they have been made in this particular case; and I cannot but ask the question, as to those cases in which the Treasury ought to make a special minute for the purpose of being laid before Parliament, assuming, as I suppose we must assume, that the words "special minute" have some technical meaning, and that such letters as those which I have read do not come within it—I would ask, I say, the question, how is it possible that the title of an officer to his pension can depend upon a thing resting with the Commissioners of the Treasury alone, upon minutes to be made by them in their own proper minute-books in their own department, to which the Acts of Parliament do not give the pensioner, as far as I can see, any right of access, and which they do not even require to be communicated to the pensioner, because they only require that they shall be laid before Parliament.

With those preliminary considerations, we have to approach the words which relate to this special minute. "If the compensation shall exceed" a certain amount (and for the present purpose I need not enter into the detail of that) "such allowance shall be granted by special minute stating the special grounds for granting such allowance, which minute shall be laid before Parliament." It seems to me, that the object of that is to account for the excess, and to account for it by reasons to be communicated to Parliament, and that in the nature of the case it is not intended to affect the validity of the grant, at all events so far as relates to that which is not in excess, and which if granted alone would not require any special minute at all. But I do not shrink from going further than that, and saying that if that which is granted might properly be granted, and if the grant or the award is made, as far as the officer is concerned, in the usual manner, and communicated to him in the usual manner, I do not think that the neglect of the Treasury or of their proper officer to record in their proper books a special minute, or their neglect to lay that special minute before Parliament, need be construed as nullifying what otherwise would be a valid grant and award of a pension made and announced to the pensioner in a form which is sufficient in all other cases. Therefore I think that your

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Lordships, without doing any real violence either to the spirit or to the language of the Act of Parliament, may dispose of that argument, in a manner which certainly will avoid consequences in the last degree inconvenient, and I may add unjust, which otherwise might possibly result.

That argument being out of the way, it appears to me that the rest of the case may be disposed of without much difficulty. I will first refer to the arguments raised upon the clauses of the Act of 1877. Now the 36th clause of the Act of 1877, in its first paragraph, speaks of a case of superannuation after a certain length of service or after a certain age has been attained, but it also applies that very term "superannuation allowance" to other cases, which do not come within the natural and proper idea of the mere word "superannuation;" namely cases of incapacity from "sickness or infirmity, or injury received in the actual execution of duty," all of which are contingencies independent of mere age, independent of mere length of service, and therefore to which the term "superannuation allowance" can only be applied in a secondary, and not strictly etymological sense. That of itself seems to me to go a considerable way towards destroying the foundation of the main argument advanced at your Lordships' bar; which was this, that the term "superannuation," or "superannuation allowance," is used throughout this and other Acts in a technical sense, inapplicable to the case in which an officer is retired and put upon a pension for the reason that his office is abolished or that his retirement will facilitate improvements in the organisation of the department. I confess I can see no reason in the nature of things, or in the original meaning of the term, why what is granted upon compulsory retirement, or upon a retirement with the consent of the officer because it is desirable to abolish his office or to re-organise his department, may not be called a superannuation allowance, as much as in a case in which he retires not because he has attained a certain age or has served for a certain number of years, but because he has suffered accidental injury in the service or has fallen into sickness or other infirmity.

Then, the next section of the 36th clause is this, which I think is applicable to the present case: "If any office in any prison to which this Act applies is abolished, or any officer is retired or removed, any existing officer of a prison who, by reason of such abolition, retirement or removal, is deprived of any salary or emoluments shall be dealt with in manner provided by the Superannuation Act 1859 with respect to a person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organisation of the department to which he belongs." That, in effect, means, that such a case as that with which we are now dealing should be dealt with under the 7th section of the Superannuation Act 1859. The third paragraph of clause 36 in the Act of 1877 deals with "prison service," which is there defined; and we then come to the particular words upon which so much argument was offered to your Lordships: "Any annuity by way of superannuation allowance or gratuity granted under this section shall be apportioned between the period of service before the commencement of this Act and the period of service after the commencement of this Act; and so much of such annuity or allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid, but without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department, shall be paid by the prison authority of the prison in which the officer to whom such annuity or allowance is granted was serving at the date of the commencement of this Act out of rates which at or immediately before the commencement of this Act were applicable to the payment of the salary of such officer, and the residue shall be paid out of moneys provided by Parliament." It was insisted, as I understood the argument, that because that portion of the clause begins with the words, "any annuity by way of superannuation allowance or gratuity granted under this section," the apportionment provided for would only be applicable to a case in which the retirement is after a certain length of service or a certain age, or from incapacity by reason of sickness, age, infirmity, or injury received in the execution of the office; as to which it is indeed true, that, in the first paragraph of the section, there are the words "an annuity by way of superannuation allowance or a gratuity,"

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the same words which we have in this fourth paragraph. The argument was, that those words, occurring in both those places, mean the same thing in both, and that therefore they mean in the second place neither more nor less than they mean in the first, and are inapplicable to any of the cases mentioned in the second paragraph of the section, and therefore to the case now before your Lordships' House. Now I cannot but think that that argument sticks to the letter and loses sight entirely of the spirit and substance of the clause. I am not sure whether I should have been able to say so, if there had been nothing in the context of the paragraph itself to make the matter clear; because undoubtedly there would then have been force in the observation, that the words "any annuity by way of superannuation allowance or gratuity" are the very same words which occur in the first paragraph of the section, and do not occur in the section elsewhere. That is the only argument which would have had much weight with me even if the context had not made, as it does to my mind make, the matter clear; because, although it may be very true that on account of the natural and original meaning of the word "superannuation," there may be particular clauses in some of the Acts upon this subject which give a more limited meaning to that word than others, on the other hand there are some clauses which appear to me to justify and even to require a larger meaning; and I cannot but say that the mere fact that the Act of Parliament which is expressly here referred to as that by which the grant of a pension in such a case as that now before your Lordships is to be regulated is called "The Superannuation Act 1859," and is referred to here by that title, goes a long way to repel the narrow and technical interpretation which the argument of the appellants seeks to put upon that word "superannuation." The legislature thought, that all the cases of pensions provided for by the Act came within the sense of the word "superannuation," as conveniently and popularly used, sufficiently to make that short title a good general description of all that was done by the Act.

But I need not dwell upon that point; because it seems to me that, upon the very face of this clause, the legislature has manifested in the most unequivocal manner possible an intention to

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include in these words, "any annuity by way of superannuation allowance or gratuity," the particular case provided for by the second paragraph, with which your Lordships have now to deal. The words "without taking into account any number of years added to the officer's service on account of abolition of office, or for facilitating the organisation of the department," are applicable to that case and inapplicable to any other; and the fact that this is not to be taken into account, shews plainly that but for that exclusion it might have been taken into account in the view of the legislature; and therefore those are cases within the purview and intent of this particular paragraph. That argument of the appellants, therefore, appears to me entirely to fail.

I now come to the remaining arguments. The argument upon the 53rd section was this, that this particular officer would not have been entitled to such an allowance as that which has been awarded to him under the Prison Act 1865. The section is: "Nothing in this Act contained shall entitle any existing officer of a prison to any superannuation or other allowance, the conditions of whose office would not have entitled him to superannuation or other allowance under the Prison Act 1865." But the conditions of such an office as this would have entitled this officer to a superannuation or allowance under the Prison Act 1865, that is to say, would have entitled him in the only sense in which anybody could have been entitled; it would have been in the power of the proper authorities to give it to him. And the section does not say that he shall not be entitled to any other or greater superannuation allowance than he could have obtained under the Prison Act 1865; but that, unless he is an officer holding such an office as would have brought him within the superannuation provisions of the Act of 1865, he shall not be brought within the present Act. But Colonel Colvill was an officer who would have been within those provisions, and being such an officer, he gets the full benefit of the provisions of this Act. That argument, therefore, fails.

Then we come to the argument upon the Act of 1859. Now I do not think it advisable without necessity to enter into a question, upon which possibly some of your Lordships may not take the same view as I do. I have certainly formed a pretty clear

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opinion as to what is the meaning of the hypothesis in the 7th section of the Act of 1859, upon which the necessity for a special minute depends, and I certainly do think that it contemplates this case, that there is an amount ascertained which it is proposed to award by way of compensation to the officer under that section, which would exceed the amount to which he would be entitled, calculated upon the principles of the 2nd section, with ten years added to his actual period of service; and it does not appear to me, I confess, at present (though I do not think it at all necessary for your Lordships to decide the question) that it can be expanded into anything more than ten years by anything which is done, or by any right or title derived by the officer, under the 4th section. But that point your Lordships, in my opinion, need not determine, because it is admitted here, as a matter of fact, that nothing has been apportioned against the justices, of the annuity granted to Colonel Colvill, excepting the amount to which he would be entitled in respect of length of service computed upon the principles of the 2nd section of the Act of 1859, and the addition made, if properly made, under the 4th section of the same Act; and the question is whether those are matters which, according to the true interpretation of the Act of 1877, can properly be chargeable upon the county by way of apportionment. No question arises as to the amount computed upon the actual length of service under the 2nd section; it is admitted, upon the assumption of there being a valid grant of pension at all, that it was apportionable, as it has been apportioned, against the county. But the question arises under the 4th section. Now the 4th section of the Act of 1859 provided this, that by a general order or warrant the Treasury might direct that when any person now holding an office coming within any of certain classes, should retire from the public service, a number of years, not exceeding twenty, to be specified in the order or warrant, should, in computing the amount of superannuation allowance under the 2nd section, be added to the number of years during which he might have actually served. It is manifest that, in the cases to which that provision applies, the additional number of years is not added in respect of abolition of office, or to aid in the reorganisation of the department, but it is added in respect of a totally different class of considerations, namely, the character of the office and the requirement of peculiar qualifications in the person holding that office.

Well, that being so, the next question is whether Colonel Colvill's case comes within that provision at all or not. In the year 1860, the year which immediately followed the passing of that Act, a general order or warrant was duly made by the Commissioners of the Treasury specifying certain classes of officers who were to have the benefit of this 4th section to the extent there mentioned. The governors of prisons were put in, as I understand, so as to entitle them on retirement to have five years added to their period of service on account of special qualifications, within the meaning of that 4th section, being required of them. It is said, and truly said, that in 1860 Colonel Colvill was not a governor of any public prison, and was not a public servant or a public civil servant in the sense of these Acts or of that order. But when in 1877 he was brought within that category, and when under the Act of 1877 the Superannnation Act of 1859 was made applicable to the case of pension upon the retirement of such an officer, I apprehend that the Act of 1859 was made applicable in all its provisions, and as he had then become and was a public servant in the civil service of the Crown within one of those categories which had been mentioned in the order or warrant of 1860, it appears to me impossible to say that the 2nd section of the Act of 1859 is to be applied to this case and not the 4th. That being so, the addition of five years is properly made to his actual period of service, and that is in respect of the peculiar character of his office and the qualifications required for it.

That being so, when we come back to the 36th section of the Act of 1877 it seems impossible to treat those five years as to be excluded under the words, "without taking into account any number of years added to the officer's service on account of abolition of office, or for facilitating the organisation of the department;" because those five years were not added to the officer's service, "on account of abolition of office or for facilitating the organisation of the department," but were added for a totally different purpose, and nothing has been added which can come

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within that category. Nothing has been apportioned against the county except that portion of this gentleman's pension which represents his actual period of service and that further portion which represents the allowance of so many years in addition to the years of actual service, not added on account of the abolition of his office or for facilitating the organisation of the department, but because he was the governor of a prison in a particular category.

I cannot agree with the argument of Mr. Wright, that there is any difficulty in apportioning over the number of years' service the total amount of compensation, though five years are added to the actual service. It is as easy to apportion a hypothetical addition of five years as it is to apportion the actual period of service. The thing to be apportioned is "any annuity by way of superannuation allowance or gratuity granted under this section." The annuity granted under this section, excluding that which it is proper to exclude, is the annuity which represents the actual period of service and the five years added. The manner of apportionment is free from difficulty, because it is to be between the period of service before the commencement of this Act, an ascertained period, and the period of service after the commencement of this Act, an ascertained period. The numerical ratio is ascertained by a comparison of the two periods. The thing to be apportioned is the annuity actually granted by way of superannuation allowance, excluding, as in this case has been excluded, any number of years added for abolition of office or facilitating the organisation of the department.

Therefore, the principal argument failing, namely, that there has been no valid grant of an allowance, the result is that the order appealed from is right and ought to be affirmed, and I move your Lordships accordingly.

LORD BLACKBURN:—

My Lords, I am of the same opinion. It think it is most convenient to begin by referring to the Superannuation Act of 1859 and considering the question as if the justices of Middlesex had nothing to do with this case, as if it was Colonel Colvill who was setting up a claim which had somehow come before us to have a pension calculated upon the number of years that have been allowed to him, and that he was seeking that pension under the Superannuation Act of 1859. I will consider that first.

Now, supposing that to be so, sect. 7 is the one under which he would claim: "It shall be lawful for the Commissioners of the Treasury to grant to any person retiring or removed from the public service" upon grounds which apply to Colonel Colvill's case, "such special annual allowance by way of compensation as on a full consideration of the circumstances of the case may seem to the said commissioners to be a reasonable and just compensation for the loss of office." Now, stopping there, it is plain enough that the Lords of the Treasury are to be the sole judges, or the persons who are to judge what they think is reasonable and just compensation for the loss of office, and that they are to grant that by way of an annual allowance. But what follows immediately afterwards gives an indication of how the legislature supposed they would consider it. "If the compensation shall exceed the amount to which such person would have been entitled under the scale of superannuation provided by this Act" is the idea which then comes in. From that it is plain enough that the legislature thought that the annuity which would be granted would be considered thus: if instead of the man being turned out of his office he had retired as being superannuated he would have had an annuity of such and such a proportion to his salary. In Colonel Colvill's case it would have been an annuity proportioned to twenty-three years of service, he having come within the class which is mentioned in sect. 4 as being a peculiar class to be dealt with in a peculiar manner.

On that ground Colonel Colvill would have been entitled to that unless what follows is made a condition precedent to the granting by the commissioners of the retiring allowance to him. It says that if it exceeds what it would be if ten years were added to the number of years he had actually served "such allowance shall be granted by special minute stating the special grounds for granting such allowance, which minute shall be laid before Parliament." I do not inquire whether or no the particular case is brought within that class for which a special minute is required—whether ten years under this section being added, and five years being added under sect. 4, brings it within the term requiring a special minute. I assume for the purposes of the argument that it does require a special minute (though I am not prepared exactly to express an opinion either one way or the other upon the question) and that the Lords of the Treasury neglected their duty in not making a special minute stating the special grounds, and laying that minute before Parliament. I think that is not intended to be a condition precedent to the grant in favour of the officer of his retiring allowance, but as what is commonly called directory only. It is an enactment put in (if I may use plain English about it) in case there should be "jobs"; the Lords of the Treasury when they do this unusual thing shall state in a minute their special reasons for it, and shall lay that minute before Parliament and have them criticised. There are many cases—I was not aware that this point was to be raised, and I have not looked into them and I cannot refer to them, but there is a numerous class of cases in which it has been held that certain provisions in Acts of Parliament are directory in the sense that they were not meant to be a condition precedent to a grant or whatever it may be, but a condition subsequent; a condition as to which the responsible persons may be blameable and punishable if they do not act upon it, but their not acting upon it shall not invalidate what they have done, third persons having nothing to do with that. Therefore, if this case had arisen under the Superannuation Act of 1859 and that Act alone, I think that Colonel Colvill would have been entitled to the superannuation allowance which he has received, calculated upon a number of years including both the years of his service and also the ten years which have been added on account of the abolition of his office.

Now let us see what the legislature said in another Act of Parliament. Inasmuch as this was a prison office which had been transferred to the Government, and from which Colonel Colvill retired after he had become a civil servant of the Government under the Prison Act, we are referred to sect. 36 of the Act of 1877. That section provides, first, that if any officer retires on account of ill health, or for various other reasons which do not apply to the present case, a superannuation allowance may be granted. Then, secondly, it says that, " If any office in any prison to which this Act applies is abolished, or any officer is retired or removed, any existing officer of a prison who by reason of such abolition, retirement, or removal, is deprived of any salary or emoluments, shall be dealt with in manner provided by the Superannuation Act 1859, with respect to a person retiring or removed from the public service in consequence of the abolition of his office," and so on. That brings us to this, that Colonel Colvill having now retired his case is to be dealt with according to the Act of 1859, sect. 7, to which I have already alluded; and that says that he is to have such annual allowance as the Lords of the Treasury, considering all the circumstances, think it just to appoint to him.

Then comes the provision on which the present question arises: " Any annuity by way of superannuation allowance or gratuity granted under this section" (that is sect. 36), which includes I should have thought, if there had been nothing else to the contrary, not only a superannuation allowance properly so called but an allowance granted under the clause which has preceded it, beginning with the words " If any office in any prison is abolished." I should have thought that it would have come under that if it had stood alone, but that would have been a matter of some doubt and difficulty. It " shall be apportioned between the period of service before the commencement of this Act and the period of service after the commencement of this Act; and so much of such annuity or allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid"—In the present case the amount of salary was not altered, but owing to Colonel Colvill having become a civil servant the amount of his superannuation allowance on which he would retire was altered; but that I think does not affect the present case—" But without taking into account any number of years added to the officer's service on account of abolition of office, or for facilitating the organisation of the department, shall be paid by the prison authority." That is where the question really comes in.

It was argued that in the previous Acts (and owing to the very clumsy mode in which the Act is drawn by referring to a whole number of previous Acts I suppose we ought to look at them all) "superannuation allowance" had acquired a technical meaning, or rather that it had often been used in one sense whereas "allowance by way of compensation" had been used in another, and therefore that we ought to construe the earlier part of the section as confined to those which were strictly superannuation allowances. That argument would hardly, I think, have prevailed with me (although I see Lindley L.J., if I understand him rightly, says in his judgment that it would have prevailed with him) if this subsequent part of the section had not come in, but when I find these words added, "But without taking into account any number of years added to the officer's service on account of abolition of office," it becomes quite clear to my mind that the legislature meant to include in it, not only the superannuation allowance which was mentioned in the first part of the paragraph, but also the allowance which, by the wording of the second paragraph in sect. 36 is ordered to be given, dealing with him in the same way as he would have been dealt with under the Act of 1859 if he had been a civil servant under the Act of 1859; and in that case he is to have such annual allowance as the Lords of the Treasury have thought to be reasonable and just compensation; but if such annual allowance exceeds the amount which he would have been entitled to as superannuation, then, says the Act, that portion of the amount which is measured by the additional years granted on account of abolition of office, shall be struck off, and the justices, or the people who pay the rates, shall not be called upon to pay that, but it shall be paid out of moneys voted by Parliament. Why should not that be just and proper? I cannot see. It seems to me very reasonable and proper. If once you say that the retirement is to be compensation for having served for a time under the ratepayers, and then after a time, having served under the Crown and now being turned out, it seems to be most reasonable that the amount of compensation which is given should, as far as regards the service before, fall upon the ratepayers, and that the amount as far as regards the service since should fall upon the Crown who have enjoyed it since; and so far as regards that portion which is added in consequence of the abolition of the office subsequently to his becoming a servant of the Crown, that should fall on the Crown. That seems to be perfectly reasonable and just, and that is, I think, what the legislature has said.

There is one other point that was made. It was said that under sect. 4 of the Superannuation Act the amount which he was to have when he was retiring under superannuation was to depend on the number of years' service, and if he was in a particular class within which the governors of prisons (the office which Colonel Colvill held) were brought, he was not only to have that amount of superannuation which was allowed him for the years of service, but also five years more, just as if he had served five years more. Such is the enactment there. That is an addition to his superannuation allowance—if it had come to be a superannuation allowance—by adding years, but it is not an addition by adding years owing to the abolition of the office. It is the amount of the superannuation which he would have been entitled to upon his past service, he being in a particular class in which in that particular way the amount of superannuation has been increased, and therefore it seems to me to be clear enough, looking at it quite independently of the other question, that the five years added under sect. 4 is just like the twenty-three years actually served; not an addition on account of the abolition of the office, but an addition on account of qualification, and consequently it is not taken out of the 36th section, and it is not prevented from being part of what would fall on the ratepayers of Middlesex.

There were one or two smaller points about the nature of the appointments of Colonel Colvill, but I do not think they were much pressed, and certainly they seem to me to have been completely disposed of; therefore I will not waste time by going into them. I therefore quite agree that the decision below is correct, and that it should be affirmed.

LORD WATSON :—

My Lords, I am of the same opinion in this case with that which has been already expressed by my noble and learned friends. I cannot say that the 36th section of the Prison Act 1877 appears to my mind to be of so extremely doubtful interpretation as it was regarded by the learned judges of the Court of Appeal. No doubt if you look at the provisions of that Act and also the provisions of the various Superannuation Acts that have been passed from time to time, there is a good deal of looseness in the way in which the terms "superannuation allowance" and "annuity by way of superannuation allowance" have been used. These expressions have not in all cases been very appropriate, but I do not think there can be any reasonable doubt as to their signification in the 4th paragraph of the 36th section of the Act of 1877.

Turning to the provisions of the Superannuation Act of 1859 I think Mr. Wright's criticisms upon the term "superannuation allowance" were so far justified. I think the term is in that Act used to denote an allowance made in respect of service, and calculated according to the period of service upon a higher and lower scale according as the case dealt with by the Commissioners of the Treasury is or is not within sect. 4 as well as within sect. 2 of the Act. On the other hand where an office has been abolished, or an officer entitled to superannuation allowance has been retired in order to make way for the re-organisation of the public department to which he belongs, the consideration given to him in respect of his removal or retirement is termed in the statute an "allowance," and in other parts of it is dealt with as compensation. But whatever may be the meaning of the words as used in the Act of 1859 we are not in this question between the Treasury and the justices dealing with the provisions of that statute alone; we are under the 36th section of the Prison Act. Now at the outset of that section the words an "annuity by way of super annuation allowance" are undoubtedly applied to the ordinary case of the retirement of an officer, but including retirement not necessarily from age but possibly from injuries received in the actual execution of his duty, or from sickness, and so forth. Then follows the provision in the second paragraph of that section with regard to the case of retirement or removal which is dealt with by the 7th section of the Act of 1859, and the provision made in the statute of 1877 is that cases of prison officers coming within that category shall be dealt with in manner provided by the Superannuation Act of 1859; and if the enactment had ended there, there would have been some room for the argument which was addressed to us on behalf of the appellants, but when you come to the 4th paragraph, which is really the material part of the clause in the present case, it is perfectly clear that the legislature by the words "annuity by way of superannuation allowance or gratuity" intended to include not only allowances made in respect of service and calculated by duration of service, but also allowances made in respect of abolition of office and enforced retirement in order to make way for improvements in the organisation of the officer's department, because it provides that such annuity when apportioned shall not be apportioned as a whole, but that in separating the amounts that are to be severally borne by the Treasury on the one hand and the old prison authority on the other, you are to lay out of the account altogether that part of the allowance which has been added by reason of the abolition of office or the compulsory retirement of the officer.

Now that paragraph not only points to the very wide meaning which the legislature obviously intended to give to the words "annuity by way of superannuation allowance," but to my mind it goes a step further. It indicates that it is to be the duty of the Treasury, in giving an allowance to one who has been an officer of the old prison authority, to give him the total sum upon different considerations; to give him first an allowance in respect of the term of services (if any) to which he is entitled, and then to add to it a special allowance under sect. 7 irrespective of service, and on account solely of abolition of office or compulsory retirement. If that were not given effect to by the Treasury it would be impossible, so far as I can see, to arrive at the just sum which is to be apportioned as between the Treasury and the justices.

Now the provision of that 4th clause is that the justices are to bear their due proportion, according to the term of years for which the officer has served under them, of so much of the annuity or allowance as is payable in respect of service before the commencement of this Act. That clearly refers to the allowance to which the officer might be entitled under sect. 2 of the Superannuation Act, because that in terms of sect. 2 is an allowance granted to a person who has served in an established capacity in the permanent civil service of the State. But what is added to that under sect. 4 of the Act of 1859 is quite as much an allowance in respect of service as the allowance given him under sect. 2. As I read it, sect. 4 is not a separate and independent enactment giving a distinct allowance for distinct considerations, but an enactment intimately connected with sect. 2, giving an allowance upon an increased scale to officers in whose cases, for the due performance of the duties of their office, higher qualifications are required than in ordinary circumstances. The provision of sect. 4 is not that an addition shall be made or a separate allowance given, but that in computing the amount of superannuation allowance which may be granted to him under the foregoing section of the Act there shall be added a certain number of years. The provision is made, not for the purpose of giving a separate allowance, but for the purpose of giving an additional item leading to an increased total sum in computing the provision under sect. 2 of the statute.

Well that being so, I think it perfectly clear upon these considerations that sect. 36 of the Act makes it incumbent on the justices to bear that proportion of the retiring allowance of Colonel Colvill which the judgment of the Court of Appeal lays upon them.

But then a very ingenious argument was raised, and more firmly insisted upon at your Lordships' bar than it seems to have been before the Court of Appeal, to this effect, that under sect. 7 it is incumbent on the Treasury when they give an allowance to an officer who has been removed or compulsorily retired for the purposes in that section stated, to proceed by means of a special minute, and that special minute must be laid before Parliament. Now I do not think it necessary for the purposes of this case to state what my own views are of the just construction of that section. That is a question which it does not appear to me that the justices, the appellants, are entitled to raise in the present case. The enactments with regard to a special minute appear to me to be plainly directory. I do not think it was intended that it should be a condition precedent of an arrangement made by the Treasury with respect to the retirement of a prison officer or any other civil servant whose case falls within the 7th section of the statute, that it should have the implied assent of Parliament, from the presentation of such a minute, and its lying unchallenged on the tables of either House for a certain period. That was not the intention of the provision. It was not intended to take away from the Commissioners of the Treasury the power of making these arrangements. The object of the provision is that, for the information of Parliament, a minute containing the special reasons for granting a large allowance to a civil servant in such circumstances shall be laid upon the table, it being of course within the power of one of the Houses of Parliament to deal as they choose in Committee of Supply with the allowances that are made by the Treasury. Therefore it appears to me that we must here assume that everything was rightly done, and certainly that it is not within the competency of the appellants to challenge what was done by the Treasury in making an addition, as I think the Act of 1877 directs them to do, to the salary of Colonel Colvill in respect of his having been removed in order to provide for the better organisation of the department over which he so long presided.

I, therefore, agree with your Lordships that the judgment under appeal ought to be affirmed.

LORD FITZGERALD:—

My Lords, there was a real and substantial question in the case very much discussed in the Court below and at your Lordships' bar. That was whether the justices were liable to any portion whatsoever of this grant of an annuity to Colonel Colvill under the terms of sect. 36 upon the true construction of them. But the argument of Mr. Wright, I think, was met very firmly in the Queen's Bench Division by Stephen J., and also in the Court of Appeal, with some little shade of hesitation, by Lindley L.J. Your Lordships have adopted the views of both the Divisional Court and the Court of Appeal, and in your Lordships' views I entirely concur. Now, it is very agreeable in also adopting your Lordships' solution of the various difficulties that the ingenuity of Mr. Wright has raised in his argument here, to be able to come to the conclusion, that assuming the construction of sect. 36 as adopted by your Lordships to be the true one, the justices are only called upon to pay exactly what they ought to pay, and not one farthing more. It is true that Colonel Colvill did go through a short service after the Prison Act had come into operation, but no allowance whatever was made in respect of that. I think it was four months. The Treasury Commissioners took the twenty-three years of actual service before the Act, and superadding the five years under sect. 4, that made the $\frac{28}{60}$ths which they allowed him for the service before the Act, and nothing more, and in the allocation of the entire annuity that is exactly what the justices are required to pay. Then the remaining portion, as to which it is said the special minute required by sect. 7 ought to have been granted, the $\frac{10}{60}$ths, does not fall upon the justices; they are not injured by it. They are not affected by that $\frac{10}{60}$ths, and in my opinion they have no right whatever to inquire whether that $\frac{10}{60}$ths was or was not justified by a special minute under sect. 7. On these grounds I entirely agree with your Lordships that the appeal should be dismissed.

R. S. Wright for the appellants submitted, and *Danckwerts* for the Crown admitted, that this was not one of the class of cases in which the Crown receives or pays costs.

Order appealed from affirmed, and appeal dismissed.

Lords' Journals April 4th 1884.

Solicitor for appellants: *R. Nicholson.*
Solicitor for respondent: *The Solicitor to the Treasury.*

[HOUSE OF LORDS.]

THE GREAT WESTERN RAILWAY COMPANY . . . . APPELLANTS;

H. L. (E.)
1884
May 6.

AND

THE SWINDON AND CHELTENHAM EXTENSION RAILWAY COMPANY . RESPONDENTS.

Railway Company—Compulsory Powers—Easement—Hereditaments—"Land," whether includes Incorporeal Hereditaments—Lands Clauses Consolidation Act 1845 (8 & 9 *Vict. c.* 18) *ss.* 3, 16, 84, 85.

By a special Act the S. Co. were authorized to make a railway and to carry it across the railway of the G. W. Co., at one point by a bridge over and at another by an archway under that railway, the archway to remain the property of the G. W. Co. The Act by s. 8, which was inserted at the instance of the G. W. Co. for their protection, provided that the S. Co. should not purchase and take any land of the G. W. Co. which the S. Co. were authorized to use enter upon or interfere with, but that the S. Co. might purchase and take, and the G. W. Co. should sell and grant accordingly, an easement or right of using the same in perpetuity for the purposes of the Act; and by s. 9 that if any dispute should arise respecting the matters aforesaid it should be settled by an arbitrator to be appointed under the Act. The Lands Clauses Act 1845 (except where expressly varied by the Act) was incorporated therewith, and it was enacted that the words and expressions to which meanings were assigned by the Lands Clauses Act should have the same respective meanings unless there was something in the subject or context repugnant to such construction.

The S. Co. gave the G. W. Co. a notice to treat for the purchase of an easement or right in or over lands of the G. W. Co. for the purposes of the crossings, and shortly afterwards a notice of their desire to enter upon and use the lands for those purposes, and of their intention to apply to the Board of Trade to appoint a surveyor to determine the value of such easement or right. The valuation was made, and the S. Co. deposited the amount and entered into a bond under s. 85 of the Lands Clauses Act.

The G. W. Co. having brought an action for an injunction to restrain the S. Co. from entering or continuing upon the lands mentioned in the notice to treat or from putting in force any of the powers of the special Act or of the Lands Clauses Act in relation to the compulsory purchase of land, on the ground that the capital of the S. Co. had not been duly subscribed as required by s. 16 of the Lands Clauses Act:—

Held, by Lords Bramwell and FitzGerald, affirming the decision of the

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Court of Appeal, Lord Watson dissenting, that the S. Co. could not be restrained on that ground:

By Lord FitzGerald, That (1) the assertion of the rights conferred by s. 8 of the special Act was not a "putting in force of the powers of the Lands Clauses Act or of the special Act in relation to the compulsory taking of land": and (2) that even if the perpetual easements created by s. 8 of the special Act would constitute "land" within s. 16 of the Lands Clauses Act, yet the case had been taken out of the compulsory powers of the Lands Clauses Act by s. 8 of the special Act.

APPEAL from an order of the Court of Appeal (1).

The action was brought by the appellants for an injunction to restrain the respondents under the circumstances stated in the head-note. Chitty J. made an order for the injunction, which was reversed by the Court of Appeal (Jessel M.R. and Bowen L.J., Cotton L.J. dissenting). The material clauses of the respondents' special Act are set out in the report of the decisions below (2), and are summarized in the judgment of Lord FitzGerald in this House.

Feb. 11, 12, 14. *R. E. Webster* Q.C. and *R. S. Wright* (*Romer* Q.C. with them) for the appellants:—

The judgments of Chitty J. and Cotton L.J. are right. The respondents gave notice to treat for an easement or right which is a "hereditament," and is therefore "land" within sect. 16 of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18) when read together with the interpretation clause sect. 3. The effect of the material sections of the respondents' special Act is that they contemplate putting in force the provisions of the Lands Clauses Act. There is no provision in the special Act *requiring* payment for the purchase of the easement except the arbitration clause. The right in question is much more than an easement; it is a right in the nature of property, involving the exclusive occupation of part of the appellants' soil. A ferry, being a franchise, is an hereditament and therefore "land" within the Lands Clauses Act: "hereditament" in that Act means anything which is the subject of inheritance: per Blackburn J. in

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(1) 22 Ch. D. 677.

(2) 22 Ch. D. 677. The date of the notice to treat was the 12th of August 1882, and not the 31st of March, as stated in 22 Ch. D. p. 682.

Reg. v. *Cambrian Railway Company* (1). Moreover sect. 6 of the Lands Clauses Act authorizes companies to purchase any *interest* in land. This is clearly an interest in land. The respondents having served a notice to treat under sect. 18 of the Lands Clauses Act cannot contend that they are not subject to the provisions of that Act.

Upjohn for the respondents:—

The notice to treat was not a notice under sect. 18 of the Lands Clauses Act. It was a good notice under the special Act: whether it is a good notice under sect. 18 of the Lands Clauses Act is immaterial. The respondents are not within sect. 16 at all, for two reasons: First, because they are not putting in force any of the "powers in relation to the compulsory taking of 'land.'" Entry under sect. 85 of the Lands Clauses Act is not an exercise of the powers of compulsory purchase: *Marquis of Salisbury* v. *Great Northern Railway Company* (2). Sects. 16 and 85 only affect the *occupation* of the land, per the Court of Appeal in *Loosemore* v. *Tiverton, &c., Company* (3). Secondly the respondents are not within sect. 16, because this easement or right is not "land" within sect. 16. The respondents are nevertheless entitled to enter and use under sect. 85, the easement being such as to confer a right of user of land. The respondents do not "take lands": they take a right to use lands. This is a taking by parliamentary agreement as embodied in the special Act: not a compulsory taking. The appellants must fail unless they make out that the taking was compulsory, and that the taking was of "lands." That it was not compulsory is shewn by the fact of the parliamentary bargain: such a bargain is common enough and the statute must be so read: *Taylor* v. *Corporation of Oldham* (4) per Jessel M.R. A right of way may confer a right to put a bridge and metals, &c.: Gale on Easements, p. 529; *Senhouse* v. *Christian* (5). *Great Northern Railway Company* v. *East and West India Docks, &c., Company* (6) is on all fours with the present case. The plaintiffs there were allowed to acquire an easement after their power to acquire land had expired. The easement in question is not "land" within sect. 16 as interpreted by sect. 3. "Hereditaments" in the Lands Clauses Act do not include incorporeal hereditaments. Incorporeal hereditaments are not the subject of tenure unless appendant or appurtenant to corporeal hereditaments. There is no need to give a notice to treat to the owner of an easement: *Clark* v. *School Board of London* (1). The decision in *Reg.* v. *Cambrian Railway Company* (2) was overruled by *Hopkins* v. *Great Northern Railway Company* (3). In *Pinchin* v. *London and Blackwall Railway Company* (4) Lord Cranworth thought that a notice to take such an easement as the one now in question is not a notice warranted by the Lands Clauses Act; and that "hereditaments" in the interpretation clause (sect. 3) of that Act means only corporeal hereditaments, and does not include such an easement as the present. Easements come within sect. 85 where there is express power to take them: *Hill* v. *Midland Railway Company* (5). The result of the authorities is that such an easement is not "land" within sect. 16; but that the present case is within sect. 85, the respondents requiring only to "enter upon and use" but not to "take" land within the meaning of that section.

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(1) Law Rep. 6 Q. B. 422, 431.

(2) Law Rep. 17 Q. B. 840.

(3) 22 Ch. D. 25, judgment reversed in H. L. ante p. 480.

(4) 4 Ch. D. 409.

(5) 1 T. R. 560.

(6) 7 Railway Cas. 356.

[He also referred to *Macey* v. *Metropolitan Board of Works* (6), *North London Railway Company* v. *Metropolitan Board of Works* (7), *Metropolitan District Railway Company* v. *Cosh* (8), and *Metropolitan District Railway Company* v. *Sharpe* (9) relied on by Chitty J.]

Webster Q.C. replied.

The House took time for consideration.

May 6. LORD FITZGERALD:—

My Lords, This case comes before us on a writ, without pleadings, by which the Great Western Company claimed an injunction to restrain the defendants from entering or continuing on certain lands of the plaintiffs, and from putting in force any of the defendants' compulsory powers of taking lands or any easement therein, *until the capital of the defendants shall have been duly subscribed.*

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(1) Law Rep. 9 Ch. 120.

(2) Law Rep. 6 Q. B. 422.

(3) 2 Q. B. D. 224, 237.

(4) 5 D. M. & G. 851, 861.

(5) 21 Ch. D. 143, 147.

(6) 33 L. J. (Ch.) 377.

(7) John. 405.

(8) 13 Ch. D. 607.

(9) 5 App. Cas. 425.

There is no controversy as to the facts. The plaintiffs did not either in the Court below or here seek to amend, and the question is whether sect. 16 of the Lands Clauses Act 1845 applies to and governs the case.

Before determining this question, we must examine the nature and description of that which sect. 8 of the special Act (expressed to be "for the protection of the Great Western Company") authorizes the Swindon Company to take and to do, and calls "an easement or right of using." Sect. 8 of the special Act elaborately defines what may be done and what is prohibited: 1. The Swindon Company is not permitted to interfere with or execute any works whatever under, over, or affecting the railway or lands of the Great Western Company until plans have been furnished to and approved of by the principal engineer of that company, or failing him, by an engineer to be approved of by the Board of Trade, and then such works are to be at the sole expense of the Swindon Company. 2. The Swindon Railway No. 1 is to be carried at one point over, and at another point under, the Great Western: at each point by a bridge or arch of certain dimensions, with an express proviso to secure certain extensive easements at each place for the benefit of the Great Western Company, without payment for the same, so as to enable that company to provide for its own use additional lines of rails. 3. The archway which is to carry railway No. 1 under the Great Western is to be the property of that company, and form part of the structure of the Great Western Railway, with an obligation on the Swindon Company perpetually to maintain it in good and sufficient repair. 4. The Swindon Company is at all times to maintain and keep in good repair and good order and condition the bridges and other works so to be constructed. 5. Except for the purposes of those crossings, the Swindon Company shall not acquire any rights over any of the lands of the Great Western Company, or be enabled to take or use any land of that company, either temporarily or permanently, without the consent in writing of the Great Western Company, "and with respect to any lands of the Great Western Company which the company are by this Act from time to time authorized to use, enter upon, or interfere with, the company shall not purchase and take the same, but the company may purchase and take, and the Great Western Company shall sell or grant accordingly, an easement or right of using the same in perpetuity" for the purposes defined in the special Act.

It will thus be seen that the special Act has not conferred on the Swindon Company any compulsory powers to take any land, messuage, or hereditament of the Great Western Company, but that the Swindon Company is authorized to purchase and take a right created by the special Act to carry the new railway over the Great Western by means of a bridge, and under the Great Western by means of an archway, in consideration of compensation to be made to the Great Western Company, if they are entitled to any, and of the rights conferred on them of having certain extended easements over or under the line of the Swindon Company without payment. We have, therefore, before us not the case of any known easement, or of any hereditament of any tenure known to the law, but a right the result of a parliamentary arrangement of a peculiar and special nature, designed for the protection and benefit of the Great Western Company, by which on certain expressed conditions, and subject to very special safeguards, the Swindon Company is entitled to the benefit of a perpetual statutable right to carry their railway at one point over, and to run their trains at another point under, the railway of the Great Western Company.

Many questions have been discussed in the course of the argument on the construction of the Lands Clauses Act 1845, on which I do not find it necessary to express any opinion. It seems conceded that sect. 16 of that Act if interpreted as it stands, and aided only by the context of the Act itself, would not be applicable to the case of a statutable easement such as that now before us. The interpretation of "lands" in the Lands Clauses Act if that Act stood alone would probably be that it was confined to the taking of "land" as commonly understood, and that land so taken should include all existing rights, hereditaments, and easements which affected that land. The general language of the Lands Clauses Act and its context with the form of the statutable conveyance (Schedule A.), all indicate that such should be its interpretation. My noble and learned friend opposite (Lord Watson) is, I believe, of opinion that sect. 16 may have a larger and wider application when incorporated in the special Act, and so as to be applicable to all cases of compulsory acquiring of easements created by the special Act. I do not dissent from this position which must, however, depend on the language of the special Act, and renders necessary a critical examination of the defendants' special Act.

Some stress was laid on the terms of the 2nd section of the special Act by which the Lands Clauses Act is incorporated, but that incorporation would have taken place independent of sect. 2, and was necessary for the purposes of sect. 5, which describes the railway to be made by the company, and empowers the company to enter upon, take, and use such of the lands delineated on the said plans as may be required for that purpose. With sect. 5 and the prior incorporation of the Lands Clauses Act the compulsory powers given to the company are completed. Sect. 5 is followed by sects. 6, 7, 8 and 9 which require special attention. The 8th sect. "was inserted at the instance of the plaintiff company" (see affidavit of Charles Brooke, page 31) for their protection. From what? The answer is, from the exercise of these powers which the defendant company would otherwise have possessed under the 5th sect. of the special Act and the compulsory powers of the Lands Clauses Act. Sect. 8 may be said to form a special enactment, the result of a parliamentary arrangement complete in itself and providing for all contingencies. I have already adverted to its rather complicated details. The defendant company is prohibited from taking or acquiring compulsorily or otherwise any land of the plaintiff company and is strictly confined to acquiring two rights or privileges, the one to carry their railway over the railway of the plaintiff company by means of a bridge resting entirely on the land of the defendant company, but spanning by its arch the railway of the plaintiff company, and the other to carry their railway by means of a tunnel or arch under the railway of the plaintiff company, but subject to the provision that the tunnel or arch shall on completion be the property of the plaintiff company, and be deemed part of the structure of their main line to Gloucester. The defendant company is prohibited from acquiring any land from the plaintiff company, but they may purchase the rights thus defined by the statute, and which the plaintiff company is bound to sell and grant to them. The notice of the 12th of August 1882, called the "Notice to Treat," is not a notice under sect. 18 of the Lands Clauses Act 1845, but is a good notice under sub-sect. 8 of sect. 8 of the special Act.

When the defendant company thus gave notice of their election to purchase the rights specified in sect. 8, the two companies immediately stood in this relation to each other, that the one was bound to purchase and the other to sell those rights, and nothing remained to be done but to ascertain the price. Nothing is said as to price in sect. 8, but it is imported in the terms "purchase" and "sell" although the price may be nominal merely. It may be that the plaintiff company would probably sustain no loss or injury whatever from the exercise of the rights conferred on the defendant company, or might be held to be adequately compensated by the rights stipulated for and secured to them in sub-sects. 2 and 4 of sect. 8, but it was urged that no provision is made to ascertain price or compensation, and that we are thus compelled to fall back on sect. 21 and the following sections of the Lands Clauses Act. It seems to me that is not so. Sub-sect. 9 of sect. 8 in my opinion provides for the case. Its language is very general. "If any dispute shall arise respecting the matters and provisions aforesaid, or any of them, such dispute shall be settled by an arbitrator," &c. What are the matters and provisions aforesaid? The answer is to be found in the previous elaborate details of sect. 8, including the immediately preceding antecedent, viz. the purchase and sale of the statutable rights in question to the defendant company. But it was said that it was not reasonable to suppose that it was contemplated to appoint a civil engineer to settle price or compensation. Who could be more competent to determine the price, if any, to be paid for the easement conferred on the defendant company by the Act?

Sub-sect. 9 does not provide that the arbitrator should necessarily be an engineer, but when you refer back to sect. 6 relating to "the canal," and to sect. 7 relating to "the canal company," there is an express provision in sub-sect. 5 of the one and sub-sect. 12 of the other that the arbitrator is to be an engineer who is, amongst other things, to settle the amount of money to be paid under the provisions of these sections. Before leaving sects. 6 and 7, I may observe that both relate principally to works of a cognate character to those which we have to deal with. It would be in my judgment wholly unsustainable to contend that the compulsory powers of the Lands Clauses Act referred to in sect. 16 of that Act had any relation to sect. 6 of the special Act; and as to sect. 7 of that Act, which provides for the protection of the Wilts and Berks Canal Company, it is remarkable that in sub-sect. 2 where an option is given to the canal company either to grant a perpetual easement or right of using, or else sell the fee, it is specially enacted that if the canal company fail to exercise their option "the company may enter upon, take and use the lands *subject to the provisions of the Lands Clauses Act.*" This reference to the Lands Clauses Act was here wholly unnecessary if the contention of the plaintiff company is well founded.

Adopting by anticipation my noble and learned friend's (Lord Bramwell's) reading of sect. 3 of the Lands Clauses Act as to the interpretation of the word "lands," which he will himself express, and on the most careful consideration, I have come to the conclusion that the statutable rights given to the defendant company do not, nor does either of them, constitute "lands" within the meaning of sect. 16 as incorporated in the special Act, and that we ought not to strain the meaning of the section so as to embrace a case which, in my opinion, it was never intended to meet. In determining this case we cannot separate the two privileges created by sect. 8 of the special Act; and can it be said with accuracy that the privilege of constructing a bridge on their own land and carrying its one span of seventy-five feet through the air over the railway of the plaintiff company is the taking of land or of any messuage or tenement, or of any hereditament known to the law?

I think that the only answer to this must be in the negative, notwithstanding the legal maxim "cujus est solum ejus est usque ad cœlum et ad inferos." The ownership of land carries with it as one of its natural incidents the right to the air in a line above it, usque ad cœlum, but the air is not land. As to the other privilege of driving a tunnel under the plaintiff company's railway and through their soil, it is to be borne in mind that, although the defendant company is authorized to interfere with the land of the plaintiff company by constructing the tunnel, they are prohibited from taking or acquiring any land of the plaintiff company, and that the archway, or tunnel, and any extensions thereof, when constructed, continue to be the property of the plaintiff company and part of the structure of their line. The defendant company gets the privilege to construct, and when constructed, the further privilege of running their rails and carrying their trains over the floor of that arch or tunnel, but the arch itself becomes, and the solum remains, the property of the plaintiff company.

In my opinion the judgment of the Court of Appeal should be affirmed on two grounds:—1. That the assertion of the rights conferred by sect. 8 of the special Act is not a "putting in force of the powers of the Lands Clauses Act, or of the special Act, in relation to the compulsory taking of land." 2. That even if the perpetual easements created by sect. 8 of the special Act would constitute "land" within the scope of sect. 16 of the Lands Clauses Act, yet the case has been taken out of the compulsory powers of the Lands Clauses Act by the provisions of sect. 8 of the special Act.

There is another view to be considered, and which may go a considerable way to reconcile what I believe is a main difference of opinion between my noble and learned friends. If I am in error in my opinion that the compulsory powers referred to in sect. 16 are not applicable to the case before us, it would seem to me, nevertheless, that the notice of the 12th of August 1882, was not a notice to treat within sect. 18, but constituted an election to accept the rights offered by sect. 8 of the special Act. That would seem at once to create such a relation between the companies of inchoate purchase and sale as to satisfy the difficulty entertained by my noble and learned friend opposite (Lord

Watson), and enable him to coincide in opinion with my noble and learned friend beside me (Lord Bramwell) that the defendant company was in a position to take advantage of sect. 85 of the Lands Clauses Act, which stands outside the compulsory powers of the Act, and is unaltered by sect. 16.

Upon these grounds, I move that the judgment of the Court of Appeal be affirmed and the appeal dismissed with costs.

LORD WATSON:—

My Lords, the fact that this case has given rise to much difference of judicial opinion must be my excuse for stating fully the reasons for which I am unable to assent to the judgment which has been moved.

Sect. 5 of their special Act confers upon the respondent company the usual powers to make and maintain the railways therein described, and to enter upon, take, and use such of the lands delineated on the deposited plans, and described in the books of reference, as may be required for that purpose. But that enactment is qualified by sect. 8, which, inter alia, provides that, except for the purposes of the two crossings in question, the respondent company shall not take or acquire any rights over any land of the Great Western Company; and further that, as regards the lands of the Great Western Company which they are authorized to use, enter upon, or interfere with, "the company shall not purchase and take the same, but the company may purchase and take, and the Great Western Company shall sell or grant accordingly, an easement or right of using the same in perpetuity for the purposes for which, but for this enactment, the company might purchase and take the same."

It appears to me to be the necessary result of these statutory provisions that the bridge to be erected by the respondent company over the Bristol line will belong to them in fee. No part of the structure rests upon the soil of the Great Western Company. The arch is part of a building erected upon adjoining land acquired by the respondents for the purposes of their undertaking; and such a projection, made by virtue of a right of easement, does not become the property of the owner of the servient tenement. The crossing under the Gloucester line is in a somewhat different position. In that case the Great Western Company are vested with the property of the archway and works incidental thereto, which are in reality part and parcel of their own line, being the support substituted for the solid embankment to be removed in course of constructing the respondent company's railway. The solum beneath the archway remains the property of the Great Western Company; but such parts of the new railway as the rails and sleepers, and possibly the ballasting, will not in my opinion become the property of that company. The express provisions of sect. 8 (4) vesting the archway in the appellants, appear to me to indicate that the legislature did not intend to vest in them materials used for the formation of the new railway above the surface of the land.

I cannot concur in the opinion expressed by the late Master of the Rolls in the Court of Appeal to the effect that the right thus given to the respondents is in substance equivalent to running powers. Were I able to adopt that view I do not think I should hesitate to come to the same conclusion as the majority of the learned judges of the Court of Appeal. It must, in my opinion, be conceded that a statutory right which is in reality nothing more than a privilege of running trains cannot be regarded as a power to take land within the meaning of sect. 16, or any other section, of the Lands Clauses Act. But there does not appear to me to be any real analogy between a grant of running powers and the powers conferred upon the respondents by their special Act. Their right is to construct, maintain, and use in perpetuity a railway of their own above or upon the land of the Great Western Company; and that is a very different thing from a mere right to run their trains over or otherwise use the undertaking of another company.

The respondents maintain that the provisions of sect. 8 of their special Act constitute a complete voluntary agreement between the two companies for the purchase of the rights or easements in question. If that be the true construction of the clause, it is unnecessary for the respondents to resort to the powers of the general Act, either for the purpose of placing the Great Western Company and themselves in the relative position of vendors and purchasers, or for the purpose of fixing the compensation payable by them. I assume that the terms of sect. 8 were amicably adjusted between those two companies with the object of protecting (as the clause itself narrates) the interests of the Great Western Company; but that does not make the clause an agreement of sale and purchase. It must be construed according to its terms, and I fail to discover in these a single expression importing that an agreement has been concluded for the purchase by the respondents of an easement over any portion of the appellants' lands. Sect. 8 enacts that the respondents "may purchase and take," and that the appellants "shall sell or grant" such easements, these being the terms in which a statutory grant of compulsory powers is usually expressed; and its provisions are devoid of all the essentials of a contract, inasmuch as they neither impose an obligation upon the respondents to take, nor do they define the subjects which are to be taken. The respondents are empowered to create these easements upon or above any portions of the appellants' land within their limits of deviation, which are by sect. 8 (2) restricted to one hundred feet on either side of the centre line, unless the appellants shall consent in writing to a further departure from it. The respondents are placed under no statutory obligation to purchase at all, or if they do purchase, to take any particular part of the appellants' railways; and something must be done in order to fix that obligation upon them, and to define the subject matter of the purchase. Sect. 8 makes no provision for effecting either of these objects, both of which must be accomplished before there can be even an imperfect contract leaving the purchase money indeterminate. I am therefore of opinion that the respondents, when they have resolved to avail themselves of the statutory powers conferred by their special Act against the Great Western Company, can only do so by agreement or by notice to treat, in accordance with the provisions of the Lands Clauses Act.

Upon this part of the case I shall only say further that I do not think the ascertainment of the compensation which the respondents are to pay to the Great Western Company for the enactments which they are authorized to purchase and take is one of the "matters and provisions aforesaid," disputes concerning which are referred to arbitration by sect. 8 (9) of the special Act.

It appears to me that the whole effect of the enactments of that section in regard to purchase and sale is to substitute a right of use for a right of fee as the subject of compulsory purchase; that they are, in fact, a mere qualification of the power to take previously conferred by sect. 5 of the Act. Nothing is said about price in sect. 8; but the clauses of the general Act are incorporated, which do expressly provide for its ascertainment, and I am not prepared to hold that these express provisions are to be denied effect on the ground that such ascertainment ought by implication to be regarded as a dispute arising under a clause which makes no mention of price.

It was next argued for the respondents that rights of use or easements, such as they are empowered to acquire by sect. 8, are not "lands" within the meaning of the 16th and other sections of the Lands Clauses Act which relate to compulsory taking; and accordingly that their proceedings for the purpose of taking these rights of use or easements could in no event fall within the scope of sect. 16. That argument raises a very important question on the construction of the general Act. In my opinion the view taken by Chitty J. and Cotton L.J. is the right one.

The interpretation clause of the Lands Clauses Act (sect. 3) provides that the words and expressions therein defined shall "both in this and the special Act" have the several meanings thereby assigned to them "unless there be something either in the subject or context repugnant to such construction;" and it enacts that "the word 'lands' shall extend to messuages, lands, tenements, and hereditaments of any tenure." Now it is perfectly true that the word "lands" as it occurs in many of the leading clauses of the Act of 1845, is, by reason of the context, limited to corporeal hereditaments. Taking that Act per se, and irrespective of the terms of any other statute, these clauses do not appear to be applicable to the compulsory taking of an easement, at least in the sense in which the respondents are by their Act empowered to purchase and take such a right. The only easements which these provisions, read by themselves, seem to contemplate are servitude rights burdening the corporeal lands taken by the company, which are destroyed or impaired by the construction of the railway. The company are not dealt with as being either entitled or bound to purchase and take such easements, but as liable to make compensation in respect of their having by the construction of their authorized works injuriously affected the dominant land to which the easements are attached. As for the land upon which the railway is to be constructed, the compulsory clauses of the general Act contemplate that the company shall take the soil itself, and not a mere right to use it in perpetuity.

On the other hand I can see no reason for holding that in sect. 7, and other clauses of the Act which relate to purchase by agreement, the word "lands" must be restricted to corporeal hereditaments. If a landowner is willing to sell a right of use, and such a right is sufficient for all the purposes sanctioned by the special Act, I cannot conceive that it was the intention of the legislature to enact that the landowner should not sell or the company purchase, that limited right. Granting, however, that the expression "lands" in the Act of 1845 must, when the terms and context of that Act are alone regarded, bear a more restricted meaning than is assigned to it by the interpretation clause, it does not follow that it must continue to have the same limited meaning when its clauses are embedded in a context which enlarges the scope of the general Act. When that Act is incorporated with enactments which expressly confer upon the promoters power to purchase and take incorporeal hereditaments by compulsion, I think its clauses ought by virtue of their new context to be construed so as to include and apply to hereditaments which are not corporeal. It was, according to my apprehension, the purpose of the legislature that the clauses of the general Act should be capable of expansion, so as to apply not only to the cases contemplated by that Act, but to all cases of purchasing and taking sanctioned by the provisions of any of the special Acts with which they were in future to be incorporated, subject, it may be, to the proviso that the words and expressions occurring in these clauses were not to be extended beyond the meanings severally assigned to them in sect. 3 of the Act.

The respondents, however, maintained that an easement or right of use, such as their special Act empowers them to take, is not a "hereditament" within the meaning of sect. 3 of the

Lands Clauses Act, and, at all events, is not a "hereditament of tenure." As to the first branch of the argument, I confess my inability to understand why the expression "hereditaments" in sect. 3 should not be held to include incorporeal hereditaments. I think it does, and it was so held by the Court of Queen's Bench in *Reg.* v. *Cambrian Railway Company* (1), Lord Blackburn observing that "hereditaments," as used in the Act, includes "anything which is the subject of inheritance." That case was overruled by the Court of Appeal in *Hopkins* v. *Great Northern Railway Company* (2), on the ground that the injury to the ferry, for which the Court of Queen's Bench had held the company liable in compensation, was attributable to the user, and not to the construction of the railway. But Mellish L.J., who delivered the judgment of the Court of Appeal, said: "In the case of *Reg.* v. *Cambrian Railway Company* (1) the judges rely on the clause in the Lands Clauses Consolidation Act by which the word 'land' includes 'franchises.' This no doubt proves that if franchises are injured by the construction of the railway or works, which they may be, compensation may be obtained." So that the Court of Appeal, in *Hopkins* v. *Great Northern Railway Company* (2), did not differ from, but on the contrary, approved of the decision in *Reg.* v. *Cambrian Railway Company* (1), in so far as it affirmed that an incorporeal hereditament, such as a franchise of ferry, is "land" within the meaning of sect. 3, and therefore "land" within the meaning of sect. 68 of the Lands Clauses Act. In the subsequent case of *Hill* v. *Midland Railway Company* (3), where the company had power by their special Act to acquire (except in a certain event which had not occurred) a right or easement of precisely the same character as that which the respondent company are authorized to take for the purpose of crossing the appellants' Gloucester line, Fry J. held that such right or easement was, by reason of its having been made the subject of compulsory acquisition by the provisions of the special Act, brought within the scope of the statutory definition of the word "lands" as occurring in sects. 18 and 85 of the general

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(1) Law Rep. 6 Q. B. 422, 431.

(2) 2 Q. B. D. 224 237.

(3) 21 Ch. D. 143.

Act. The only authority to the contrary, which was relied on for the respondents, was *Pinchin* v. *London and Blackwall Railway Company* (1). The observations made by Lord Cranworth in that case are entitled to the greatest respect; but I agree with Cotton L.J. (2) in thinking that these observations were directed to the question whether the word "lands" in sect. 18 of the Lands Clauses Act, apart from any peculiar powers conferred by the special Act, includes an easement. What the noble and learned Lord, as I understand him, did say, was, that the context of the general Act forbade the application of sect. 18 to "lands" which were not corporeal hereditaments, a proposition which I do not think it necessary to dispute.

Then, as regards the other branch of the argument I do not think that in order to bring it within the interpretation clause, an easement must be a hereditament of tenure. The words "of any tenure" were not, in my opinion, intended to restrict the scope of the enumeration which precedes them. I agree with my noble and learned friend (Lord Bramwell), that they ought to be read in the same sense as if the expression in the Act had been "of whatever tenure, if any." These words do not seem to have been regarded as of any consequence, at least they were not made matter of argument or of judicial comment, in the cases to which I have referred.

At the time when an injunction was applied for, the respondents were about to make an entry under sect. 85 of the Lands Clauses Act, and I understand my noble and learned friend (Lord Bramwell) to be of opinion that sect. 16 does not apply to the power given by sect. 85, which is a power to "enter upon and use," and not to "take" lands. Now I desire to say that I agree with my noble and learned friend in thinking that an entry upon lands, in terms of sect. 85, is not the exercise of a power "for the compulsory purchase or taking of lands" within the meaning of sect. 123 of the Lands Clauses Act. That was expressly decided in *Marquis of Salisbury* v. *Great Northern Railway Company* (3). And I am not prepared to hold that the powers of sect. 85 are among the powers "in relation to the compulsory taking of land for the purposes of the undertaking," which are directly struck at by the prohibition of sect. 16.

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(1) 5 D. M. & G. 851.

(2) 22 Ch. D. 706.

(3) 17 Q. B. 840.

The respondents now say that the notice which they gave the appellants, upon the 12th of August 1882, was not a notice to treat in terms of the Lands Clauses Act, but under their special Act; and that compensation for these rights of easement is not to be assessed under the provisions of the Lands Clauses Act, but by an arbitrator appointed pursuant to sect. 8 (9) of their special Act. I am not disposed to regard that contention with much favour. The notice of the 12th of August 1882 contains all the essentials of a notice to treat under sect. 18 of the general Act; and, though it proceeds on a recital of the special Act, that Act (sect. 2) expressly incorporates the Lands Clauses Act, so that an objection founded on the non-recital of the Act of 1845 would, in my opinion, be merely technical and without substance. It is possible that the notice was so framed that it might do duty either as a notice under the general or the special Act; but I am certainly under the impression that the respondents gave it to the appellants in the belief that it would be received by them as a notice to treat in terms of sect. 18. I am strongly confirmed in that impression by the proceedings which they subsequently took under sect. 85. The condition of the bond which they have executed, in compliance with the provisions of that section, in order to secure payment of the purchase-money to the appellants, is, that they shall pay, or cause to be paid, a deposit in the Bank of England, for the benefit of the parties interested, "*under the provisions of the Lands Clauses Consolidation Act* 1845, all such purchase-money and compensation as may, *in manner in the said last-mentioned Act provided*, be determined to be payable by the said Swindon and Cheltenham Extension Railway Company." If the compensation is to be determined, as they now say it is, in terms of sect. 8 (9) of the special Act, then they have not given bond for its payment, according to the provisions of sect. 85.

Thus far, I do not think there is any substantial difference between my own opinions and those which are entertained by my noble and learned friend, Lord Bramwell. But I have the misfortune to differ from my noble and learned friend in regard to certain ulterior questions arising upon the construction of the

Lands Clauses Act; and it is owing to that difference of opinion that I cannot assent to his conclusion that the judgment of the Court of Appeal ought to be affirmed.

In the first place, it is my opinion that sect. 85 does not provide for a notice to treat, either in regard to purchase or purchase-money, but simply affords to promoters the means of obtaining possession of land to which they have acquired right, as purchasers, under an inchoate or imperfect contract already constituted by compulsory notice or by agreement. I have recently had occasion, in *Tiverton and North Devon Railway Company* v. *Loosemore* (1), to explain my reasons for holding that opinion, and I shall not repeat them here. In that case Fry J. held that the provisions of sect. 85 do not relate to compulsory taking within the meaning of sect. 23; but one of the grounds upon which the learned Judge sustained the right of the company to proceed under sect. 85 was that "they had given their notice to treat long before" (2). Earl Cairns, in the same case, thus explains the scheme of the Lands Clauses Act, and the statutory consequences of a notice to take, duly given in terms of sect. 18:—"The statute appears to me to place the company and the respondent, *by the notice to treat*, in a position analogous to that of vendor and purchaser, with power to either side to have the price fixed and paid without delay, and with a further right in the company, within the period of five years, and without prejudice to the machinery for ascertaining the price, on giving adequate security for the highest value of the land, to take possession and make use of the land, whatever the legal consequence of that possession after the five years may be" (3).

To hold that promoters, who have neither made an agreement for purchase, nor given a valid notice in terms of sect. 18, can nevertheless obtain an entry under the provisions of sect. 85, would, I conceive, be productive of strange consequences. By sects. 24 and 31 of their special Act, the respondents' powers for compulsory purchase are limited to three years, and their powers for making their line to five years, from the passing of the Act. The respondents, therefore, could not create the statutory relation of

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(1) Ante, p. 480, 500.

(2) 22 Ch. D. 35, 39.

(3) Ante, p. 488, 489.

Lord Watson.

vendor and purchaser between the appellants and themselves, after the lapse of the three years, by giving a notice under sect. 18. But the powers of sect. 85 are not then taken away, and if they can be exercised independently of any previous contract, statutory or voluntary, then it must follow that a landowner who can no longer be compelled to sell, and who declines to make an agreement, may, at any time after the expiration of the three, but within the five years, be deprived of the possession of his land by virtue of sect. 85. It appears to me that the practical result would be to convert the provisions of sect. 85 into a power of compulsory taking, instead of a power to take possession under an antecedent but incomplete contract.

In the second place, the service of a notice to treat, in terms of sect. 18, by promoters who are free to exercise their compulsory powers of taking, imposes upon the landowner, whether he will or no, the obligations of an actual vendor, and leaves him no right or interest in the land included in the notice, except to have the purchase-money assessed and paid to him. According to the decision in *Marquis of Salisbury* v. *Great Northern Railway Company* (1), that is the one act of taking which must be completed before the period limited for the exercise of compulsory powers expires; all the other powers of the Act, with respect to ascertainment of compensation and entering into possession, being merely ancillary to it, and therefore not compulsory. It necessarily follows, in my opinion, that the promoters of a company, whose capital has not been subscribed, cannot give an effectual notice in terms of sect. 18; otherwise I am unable to discover, within the four corners of the Lands Clauses Act, any compulsory power to which the provisions of sect. 16 can apply. I do not say that a notice to take, given by promoters in that situation, would not be equivalent to an offer to purchase by agreement, which would be binding upon them if the landowner chose to accept it, but that it would be ineffectual to constitute a statutory contract, or to impose any obligation whatever upon a landowner who did not accept it. I agree with the decision of the Court of Common Pleas in *Guest* v. *Poole and Bournemouth Railway*

(1) 17 Q. B. 840.

Company (1). Section 16 does not disable the promoters to purchase by agreement; and when the landowner to whom a notice is given under sect. 18 assents to it, as in that case, that constitutes a voluntary agreement, against the validity of which the promoters cannot plead the prohibition of sect. 16.

I am accordingly of opinion that the respondents could not, in August 1882, give the appellants a notice to treat, having any statutory effect, because sect. 16 made it unlawful for them to do so. The notice which they gave was ineffectual per se to bind the appellants as vendors; and seeing that the appellants have never assented to that notice and have made no agreement to purchase, the respondents had, in my opinion, no right to avail themselves of the provisions of sect. 85. The radical vice which tainted their proceedings was due to the fact that their capital had not been subscribed. If it had been subscribed a notice to treat would have placed them in a position analogous to that of purchasers from the appellants, and they would have been entitled, under sect. 85, to enter upon the subjects which they had so acquired. According to the construction which I put upon these statutes, their notice was bad, whether it was given under the Lands Clauses Act or under the special Act, and they were not, in my opinion, authorized, by sect. 85, to take possession of land in which they had not previously acquired an interest.

I have therefore come to the conclusion that the appellants ought to prevail. I also think that their action is well laid, seeing that, but for the non-subscription of their capital, the whole proceedings taken by the respondents would have been unexceptionable.

LORD BRAMWELL:—

My Lords, save on one point as to which I regret to say we differ, I agree in the conclusion and in the reasoning of my noble and learned friend opposite, and I desire to rely upon his arguments to support my own.

I think that the first thing to be determined is what estate or interest the respondents are entitled to under their Act in or on the appellants' land. It is clear to me that it is what the statute calls it, an easement, or rather easements, and nothing more. It is true that the property in the bridge over the railway is not vested in the appellants, but it does not follow from that, that the respondents have any corporeal estate in it, any more than in the case of projecting eaves, or spout, or beam resting on a neighbour's wall. The respondents' estate or interest then is (if an hereditament at all) incorporeal.

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(1) Law Rep. 5 C. P. 553.

The next question is, as I think, are incorporeal hereditaments within the Lands Clauses Act, sect. 3, which says that "lands" shall extend to messuages, lands, tenements, and hereditaments of any tenure? If not, they are not within sect. 85, and the respondents had no right to enter. At first it struck me that no hereditaments were included save those that were of some tenure. And for this there is the high authority of Lord Cranworth (1). But with profound respect for that most learned, able and accurate lawyer, I have come to a different opinion, and for the following reasons:—1st, I think that as a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all. For instance, "horses, oxen, pigs, and sheep, from whatever country they may come," the latter words would apply to horses as much as to sheep. And then the general words apply to those of the antecedent to which they are applicable and not to the others, and the words are to be read as "of whatever tenure, if any." 2nd. If the general expression is limited to "hereditaments," then it does not extend to messuages, lands, and tenements, except as included in hereditaments, which cannot be the case. 3rd. If "hereditaments" was put in to include incorporeal hereditaments, we have not had any incorporeal hereditaments suggested to us which could be said to be subject to tenure. And that it was intended to include incorporeal hereditaments we ought to hold, not merely on account of the generality of the words, but also because it would be expedient to include incorporeal hereditaments in such an Act as the Lands

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(1) 5 D. M. & G. 861, 862.

Clauses. For it is to be remembered that that Act is not applicable to railways only, but to all cases where land is required, and certainly some of those cases might include the requirement of easements. For instance, suppose a school was built, it might be of the greatest importance that it should at once acquire an easement of light or way. And especially it is to be remembered that the Lands Clauses Act is to be read in connection with the special Act. 4th. Unless the Lands Clauses Act enables the respondents to purchase this easement, I do not find any machinery for fixing the price.

Then there is the authority of *Reg.* v. *Cambrian Railway Company* (1), and the reasoning in the Court of Appeal. I am of opinion then that "hereditaments" in the Lands Clauses Act taken in connection with the special Act includes incorporeal hereditaments.

I have said that I find no machinery for fixing the price of these easements other than that in the Lands Clauses Act. It is said that the matter is to be settled by sect. 8 of the respondents' special Act, and that it abrogates or supersedes the Lands Clauses Act, and for this there is the authority of Bowen L.J. (2). With sincere respect I cannot agree. We ought not to hold a sufficient Act repealed, not expressly as it might have been, but by implication, without some strong reason, and if the Lands Clauses Act extends to incorporeal hereditaments, I see none. Sect. 8 of the special Act has a heading or is under the rubric, "For the protection of the Great Western Company the following provisions shall have effect." The Great Western Company requires no protection as to price or the mode of ascertaining it, nor the respondents any provision for compelling a grant. Then subsect. 9, which is supposed to be substituted for the Lands Clauses Act as to the ascertainment of price, says, "If any dispute shall arise respecting the matters and provisions aforesaid." Now there is nothing said as to "price." Next, there might be no "*dispute*," and yet a settlement be necessary, e.g. the respondents offer a price and the appellants are silent. How is there a "dispute?" Again, the President of the Institution of Civil Engineers is to appoint the arbitrator. Very reasonable if the matter is one of engineering, and I am not prepared to deny that perhaps an engineer would be as well able to settle the price as a land valuer, but not more so. I cannot hold therefore that the clauses of the Lands Clauses Act for settling compensation are impliedly superseded by the respondents' Act. I must hold, then, that what the respondents are to have granted are easements, and that easements are within the Lands Clauses Act taken in connection with the special Act.

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(1) Law Rep. 6 Q. B. 422.

(2) 22 Ch. D. 708–714.

But it is said that, even so, the respondents were entitled to proceed under sect. 85 of the Lands Clauses Act without their whole capital being subscribed, because under sect. 85 the land is not taken but only "entered upon." I have come to the conclusion that Mr. Upjohn is right in this. From sect. 16 to sect. 68 inclusive are provisions giving power in relation to the compulsory taking of land. Sect. 69 is under a new heading. So are sects. 84 and 85. It is clear that sect. 84 applies to cases where there is an agreement as to price, as well as to cases where there is not. Sect. 85 supposes that an agreement may be come to after proceedings taken as therein mentioned. The expressions used in the heading and in both sections are "entry and enter." In sect. 89 the words are "enter upon and take *possession*," not "take" merely. The sum awarded might be larger than the sum deposited, and the sureties might be insolvent. Surely the owner of the land would not have lost his land, or his lien for its price. Sect. 16 was for the protection of landowners, but they are sufficiently protected by sect. 85 in the cases it applies to. In short, the appellants' case would read into sect. 85 provisions relating to the power of compulsory taking, i.e. purchasing, to which sect. 85 does not relate. Fry J. expressly ruled to this effect in *Loosemore* v. *Tiverton and North Devon Railway Company* (1) and on this point his ruling was not dissented from.

There is still a question however, whether assuming the use of the powers of sect. 85 not to be conditional on the capital being paid up, its language is applicable to an incorporeal hereditament.

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(1) 22 Ch. D. 25.

Not without some doubt I have come to the conclusion that it is. The way to ascertain this is to read the words in the interpretation clause as in sect. 85, and read the special Act in connection therewith and see if there is anything incongruous. If not, it applies. Read the words there thus, "If the promoters of the undertaking shall be desirous of entering upon and using any lands, messuages, or hereditaments corporeal or incorporeal, which may be required under the special Act before," &c. I see nothing incongruous in this. An easement cannot be entered on indeed, but the land over which it is enjoyed can be. In the result, I think the judgment was right, and should be affirmed.

This is the conclusion I have come to, and it is to me most unsatisfactory. For I not only should have great doubt on the question independently of the opinion of others, but in addition, I find my opinion in part dissented from by my noble and learned friend opposite (Lord Watson) and not corroborated by Chitty J. and Cotton L.J.; for Chitty J. first, Cotton L.J. afterwards, and my noble and learned friend opposite, hold as I do that these easements are within the Lands Clauses Act, and that that Act is applicable; but they do not think, as I do, that sect. 16 does not apply to sects. 84 and 85. Chitty J. and Cotton L.J., indeed, had not, that I can see, the point presented to them, and so far therefore are not affirmatively against me. But my noble and learned friend opposite has considered it, and has come to the conclusion that sect. 16 applies to sects. 84 and 85. We are therefore at direct variance on this. It adds another and most serious one to my many doubts. I will say no more on it than this, that notice to treat has been given, and that giving such a notice is not exercising any compulsory power, as it offers to treat and may produce an agreement with no compulsion.

But I must notice the judgments of the late Master of the Rolls and Bowen L.J., because if I could agree with them I need not put my judgment on the doubtful grounds I have mentioned, and not agreeing I must say why I cannot agree. I have had the greatest difficulty in understanding those judgments, very much, I believe, owing to the very imperfect and incorrect note we have of them. But I understand they mean this:—the Lands Clauses Act is out of the question; there is an

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agreement between the two companies, contained in the Act of Parliament, and that alone is to be looked to. In my opinion this is not the way to interpret an Act of Parliament. That is a law, a compulsion, and may have been, and no doubt was, quite against the will of the appellants, and no more an agreement than is submitting to a fine instead of imprisonment. At all events, we cannot interpret it on some speculation that it was. I have already given my reasons for thinking that the Lands Clauses Act is not superseded. But supposing I am wrong, the next question is, What right had the respondents to act as though these easements were granted to them before they were granted, and before the extent and limits of the right, and how it was to be enjoyed, were ascertained? I am at a loss to know. Over and over again have I read the judgments of the Master of the Rolls and Bowen L.J. and I cannot make out the reason. Whether it is my fault or the fault of the shorthand writer, I know not, but there are passages to me unintelligible. With all respect to the late Master of the Rolls, I think his judgment has a little too much of his characteristic rapidity. He says that, "the real question is whether what in my opinion amounts merely in substance to running powers is a taking of lands," &c. (1). Now, with respect, the right to be acquired by the respondents is not "running powers," nor anything the least like it. He is reported to say the appellants "acquire property in the works which are placed on these" (probably their) "lands, making the whole thing part of the main line of the Great Western Railway." I can see nothing of the sort. He says, "The Swindon Company has a right to buy and the Great Western Company are compelled to sell the right of permanently using the Great Western Company's railway by means of running trains over it." Again, nothing of the sort. But supposing he has shewn that the case is not one of compulsory taking, how does he shew that the right can be exercised before it is actually acquired and paid for? I cannot see. He refers to sect. 9 of the special Act, but he does not shew why the right can be used before it is granted. The paragraph in the Appendix, page 56, lines 13 to the end, I cannot understand.

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(1) These quotations are taken from the printed papers before the House.

Bowen L.J. has been kind enough to tell me that he held, as he recollects, that the Lands Clauses Act did not apply, and that therefore the appellants had no right to an injunction until the capital was paid up. He seems to have proceeded on the ground that the hereditament must be one of some tenure. I have already discussed that, and, with submission, cannot agree. His Lordship says, at the end of his judgment, Appendix, page 75, line 23, "In my opinion it is not a taking of land in any sense." I respectfully differ. It is not actual land indeed, but it is land as interpreted. Even if not he nowhere says, that I can see, why the right is to be enjoyed before it is acquired and paid for, except it is by saying that it is "an arrangement granting the Swindon Company that which is really analogous to, if not strictly the same as, a running power over the Great Western system for a limited portion of the Great Western line." I do not understand the last words, but I see nothing like the alleged analogy, nor why, if it exists, the right can be exercised before it is granted and paid for. From what his Lordship has told me, I think that his opinion was founded on this,—that the prayer of the plaintiffs was wrong in asking that the defendants might be restrained until the capital was paid up. My noble and learned friend on this side of the House, I believe, admits the objection I have just stated, but meets it, as did Bowen L.J., by saying that it is not and never was the case of the appellants. That is to say, it may be that the respondents had no right to do what they did until the easements were granted, but that the appellants did not put their case on that ground. This point has not been taken in the Courts below; and I own, with great respect to my noble and learned friend near me (Lord Fitz-Gerald), I entertain the strongest opinion that it ought not to prevail. It comes to this:—the respondents are in the wrong, they have done what they had no right to do, and would have been restrained from doing; but because the appellants put their case on a wrong ground the defendants are to succeed, though in no way prejudiced by the error. I am most clearly of opinion that this is a case for amendment. I feel bound to say this, or own, which I cannot, that I have been acting on wrong principles for twenty-eight years. And in this particular case the appellants' claim to an amendment is very strong; for, as I think, the respondents intended to proceed under sect. 85 of the Lands Clauses Act, whether they thought or did not think that the case generally was within that Act. The affidavit of Mr. Brooke, par. 8, shews this; and indeed their case says so, as we may gather from par. 18 of it. But whatever may have been the intention of the respondents, it is impossible not to say that they caused the appellants to believe that the proceedings were under the Lands Clauses Act. If so, the appellants had a right to say, "Stay them till they can proceed under sect. 85." Anyhow an amendment should be granted.

As I have said, I have felt bound to notice this matter, to shew why I cannot agree with the reasoning of the Court of Appeal and so put my opinion on grounds other than those as to the correctness of which I feel so little confidence. But on those grounds I think the judgment should be affirmed. I am glad to think that if I am wrong no great harm will follow, for the appellants' objection is really of no importance to them now except as to costs.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 6th May 1884.

Solicitor for appellants: *R. R. Nelson.*
Solicitors for respondents: *George Davis, Son, & Co.*

[HOUSE OF LORDS.]

HENRY WESTROPP . . . . APPELLANT;

AND

PATRICK ELLIGOTT . . . . RESPONDENT.

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Land Law (Ireland) Act 1881 (44 & 45 *Vict. c.* 49) *s.* 58 *sub-s.* 3—*Landlord and Tenant—Pasture—Land let to be used wholly or mainly for Pasture.*

By a lease in 1861 lands in Ireland of more than 100 acres were demised for twenty-one years, the tenant covenanting that he would not without the landlord's consent break up or have in tillage in any one year any greater quantity than ten acres, out of a certain specified portion, and that he would manage the land in a good and husbandlike manner and in due and regular course so that the same might not be in any way injured:—

At the time of the demise there were only fifteen acres in tillage, and the rest was used as pasture, but was not ancient pasture, the whole farm having been put in tillage (in different portions at different times) between 1852 and 1861. The tenant used the farm as a dairy farm: frequently meadowing different portions (about twenty acres each year), and sometimes selling hay off the land:—

Held, affirming the decision of the Court of Appeal (Ireland), that the farm was not a "holding let to be used wholly or mainly for the purpose of pasture" within the Land Law (Ireland) Act 1881 (44 & 45 Vict. c. 49) s. 58 sub-s. (3).

APPEAL from an order of the Court of Appeal (Ireland) of the 1st of May 1883 (1), affirming an order of the Common Pleas Division of the 2nd of March 1883 (2).

The action was brought against an overholding tenant to recover possession of lands in the county of Limerick of about 123 acres (statute measure), and was tried before Lawson J. and a common jury in Dublin. The report of Lawson J. to the Common Pleas Division adopted the certificate of Bewley Q.C., which contained the following statement of the facts proved at the trial.

The statement of claim stated the plaintiff's title, namely, that by lease bearing date the 16th of July 1861 the plaintiff demised the lands in question to the defendant for the term of twenty-one years from the 25th of March 1861; that the defendant entered into possession of the lands under that lease; and that it expired on the 25th of March 1882.

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(1) 17 Ir. Law Times, 451. (2) 17 Ir. Law Times, 152.

The statement of claim also stated a covenant in the lease by which the lessee was prohibited from breaking up or having in tillage more than ten Irish acres of the lands, such ten acres to be selected from the portion of the lands in tillage at the time of the granting of the lease and from a field adjoining the house on the lands. It also stated that at the time the said lands were so demised there were only about fifteen acres in tillage, and that the remainder was in grass, and that they were ancient pasture lands, and that since the execution of the lease the lands had been used as pasture lands.

The defence denied that the lands were ancient pasture lands or that the defendant had used them as pasture lands, and also averred that the defendant was in possession of the lands.

The plaintiff was examined, and proved the execution of the lease (which was incorporated in the certificate) and deposed that he had known the lands for upwards of forty years; that at the time of the execution of the lease there were only about fifteen acres in tillage, and that since he had known the lands they had always been used as a pasture farm, that on the expiration of the lease possession was demanded and refused by the defendant.

The original lease was entered (1), and the certificate of valuation of the lands from which it appears they are valued at £97. This closed the plaintiff's case.

The defendant was called, and deposed that he had been in possession of the lands previous to the execution of the lease and that he held them under the Court of Chancery, and he proved a lease under which he held the lands dated the 27th of February 1852. That he had while holding under that lease broken up fifteen acres each year, and that the portion so broken up extended over the entire farm. That since the date of the lease he had frequently meadowed different portions of the lands and sometimes sold hay off the lands. That the portion meadowed amounted generally to about twenty acres each year. On cross-examination he stated that he used the farm as a dairy farm.

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(1) The material covenants are set out in the judgments.

The lease of the 27th of February 1852 was entered on behalf of the defendant, and this closed the defendant's case.

Gerrard for the plaintiff (in *Bewley's* absence) asked the learned judge to direct a verdict for the plaintiff on the ground that the holding came within the exception contained in sub-s. 3 of sect. 58 of the Land Law (Ireland) Act, 1881, and that therefore the holding was excluded from the operation of the Act, and the plaintiff was entitled to possession on the expiration of the lease.

The MacDermott on behalf of the defendant asked the judge to direct a verdict for the defendant on the ground that the holding did come within the operation of the Act.

The learned judge was not asked to submit any question to the jury, and directed a verdict for the defendant, reserving liberty to the plaintiff to move the Court to enter the verdict for him.

The Common Pleas Division (Morris C.J., Harrison and O'Brien JJ.) having discharged a conditional order for a new trial on the ground of misdirection, the Court of Appeal (Lord Chancellor Law, Sullivan M.R. and FitzGibbon L.J.) affirmed the decision of the Common Pleas Division.

By sect. 58 of the Land Law (Ireland) Act 1881 (44 & 45 Vict. c. 49) it is enacted:—

"This Act . . . shall not apply to tenancies in:—

"(1.) Any holding which is not agricultural or pastoral in its character, or partly agricultural and partly pastoral; or" . . .

"(3.) Any holding let to be used wholly or mainly for the purpose of pasture and valued under the Acts relating to the valuation of property at an annual value of not less than £50; or" . . .

"(6.) Any letting in conacre or for the purposes of agistment or for temporary depasturage."

May 2, 5. *Macnaghten* Q.C. and *R. C. Dobbs* for the appellant:—

The tenancy was within the exception of the Land Law (Ireland) Act 1881 (44 & 45 Vict. c. 49) s. 58 sub-s. 3, the holding

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having been "let to be used wholly or mainly for the purpose of pasture" within the meaning of that section. To bring a case within those words it is sufficient if the holding was in fact used wholly or mainly for pasture, or was in such a state that it could not be profitably or properly used except for pasture, which was the case here. The present case is substantially the same as *Harper* v. *Davies* (1). True there was not here (as there was there) a covenant not to sell hay; but that makes no difference: *Powley* v. *Walker* (2); *Brown* v. *Crump* (3). A tenant would commit waste by ploughing up ancient pasture land, and might be restrained. In 38 & 39 Vict. c. 92 s. 5, one "improvement" is "laying down permanent pasture." The precedents in farming leases all contain precedents not to mow more than once a year: see Prideaux, Davidson, &c., &c. Pasture is of much larger signification than "grazing or grass land" which is included: see Landlord and Tenant (Ireland) Act 1870 (33 & 34 Vict. c. 46) s. 4. It means lands appropriated to the purpose of raising food for cattle only. As only ten acres could be broken up out of more than 100 acres and those ten must be taken out of a particular fifteen acres, the farm (being clearly let so that the main part was to be permanently kept in grass), must be considered as let to be used mainly for the purpose of pasture; it being not conceivable that the tenant could farm profitably by selling hay, and bringing on manure, as he would be obliged to do having regard to the covenant in the lease for good husbandry. In the 1st sub-section of the 58th section of the Land Act 1881 a distinction is drawn between agricultural and pastoral; agricultural therefore means tillage, pastoral means pasture; consequently as the farm could not in the main be tilled, it must be considered as of a pasture character because of the covenant not to till, and therefore let to be used for the purpose of pasture; "for the purpose of pasture" means providing food that only cattle could eat—that is grass.

Denis B. Sullivan (of the Irish Bar) for the respondent:—

The object of the Act of 1881 was to include all holdings that were not expressly the subject of a contract between the landlord and tenant that they should be used only for pasture. The present holding was agricultural or pastoral or partly agricultural and partly pastoral, the tenant not being restricted by the lease from meadowing any portion or the whole, or from selling the hay, and there being no obligation on him to use the lands wholly or mainly for the purpose of pasture. In *Harper* v. *Davies* (1) there was a covenant to consume the hay on the land. To bring a holding within the exception there must be a covenant not to use it otherwise than wholly or mainly for pasture: it is not enough that it cannot be used rationally or profitably otherwise than as pasture: *O'Brien* v. *White* (2); *Spaight* v. *Irish Church Temporalities Commissioners* (3). The distinction between pasture and tillage is well known to the law: *Murphy* v. *Daly* (4), per *Monaghan* C.J. citing *Atkins* v. *Temple* (5).

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(1) Ir. L. R. 12 C. L. 23.

(2) 5 T. R. 373.

(3) 1 Marsh. 567.

Macnaghten Q.C. in reply:—

O'Brien v. *White* (2) was wrongly decided. Lands kept in grass for twenty years become "ancient pasture" lands. Apart from contract every letting must be looked at with regard to the state of things existing on the creation of the tenancy. In the present case the parties contemplated only a dairy farm; the lease is consistent with that, and inconsistent with its being treated as an agricultural farm.

The House took time for consideration.

July 7. EARL OF SELBORNE L.C.—

My Lords, I am of opinion that the order appealed from in this case ought to be affirmed.

In order to justify a reversal of that order it must be made out that the land in question was "let to be used wholly or mainly for the purpose of pasture." I entertain no doubt that "pasture" in this place means feeding cattle or other live stock upon the land. This is both the etymological sense of the word and its sense according to ordinary agricultural use. I think also that it is the sense in which other cognate words occur in other parts of the Irish Land Acts of 1870 and 1881. I do not think it is enough that the land should be shewn to have been actually used, wholly or mainly, for this purpose, unless it was "let to be" so used, by which I understand that its use for that purpose must have been matter of contract, express or implied, between the landlord and the tenant.

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(1) Ir. L. R. 12 C. L. 23.
(2) 18 Ir. Law Times, 24.
(3) 11 Ir. Law Times, 140.
(4) 13 Ir. C. L. R. 239, 283.
(5) 1 Rep. in Ch. 13.

In the present case the contract between the landlord and the tenant is in writing; and unless it can be collected from the terms of that written contract (read in the light of extrinsic facts, properly appearing by the evidence) that any use of the greater part of this land for any other purpose than that of grazing or depasturage was expressly or impliedly excluded, I think it is not within the exception contained in sect. 58, sub-sect. (3) of the Irish Land Act of 1881. I use the term "excluded" rather than "prohibited," in order to avoid any unnecessary question as to what the consequences of any other use by the tenant might be, or as to the media of proof by which the exclusion of other modes of use might be established. The statement of the plaintiff in his evidence, "that since he had known the lands they had always been used as a pasture farm," cannot, in my opinion, be received, for the purpose of adding anything to the terms of the written contract, which might not otherwise, upon ordinary principles of construction, have been ascertained to be part of those terms; unless indeed the mere fact of use in a particular manner for a considerable period of time is enough to shew that any other use would be impracticable, or would be contrary to the covenant, "to manage, till, and use the lands in a good and husbandlike manner, and in due and regular course of good husbandry, so that the same might not be in any way injured or deteriorated." But it appears to me to be impossible without more to arrive at that conclusion. The words of the covenant are not less applicable, in themselves, to arable or meadow than to pasture land; and if the quality and value of the lands might have been maintained by proper manurance or otherwise, if hay or other crops were taken off the whole or the greater part of them (say, in alternate years), they would not be injured or deteriorated by that mode of use. There is nothing to shew that, in the present instance, this might not have been possible. That the whole of the lands had been since 1852 (though only a small part of them at any one time) under plough, was proved by the defendant. This alone is enough to prove that they were not "ancient" pasture, so as to make any other use of them waste. If the plaintiff's statement, that the lands had always (within his memory) "been used as a pasture farm," was not enough to shew that it was implied in the contract that they would continue to be so used, still less was the defendant's statement, that "he had used the farm as a dairy farm." I do not mean to say (as appears to have been said in *O'Brien* v. *White* (1)) that it might not be enough to shew that the lands were of such a nature that they *could not*, in the ordinary course of things, be used except for pasture: I incline to think that this, if it were shewn, would be enough. But in this case nothing of that kind appears. The evidence not only did not shew that the lands were from any cause incapable, in their own nature, of being properly used, in the ordinary course of things, otherwise than for pasture, but it was proved, as I have already said, that at one time or another since 1852 every part of them had been under tillage; and it was also proved that the Defendant had "frequently meadowed different portions of the lands."

We are brought therefore to the inquiry whether, from the express terms of the lease (having such regard as may be proper to all these extrinsic facts), it can be collected that the land was "let to be used wholly or mainly for the purpose of pasture"? There is certainly no express contract to that effect. There is nothing, in the description of the parcels or elsewhere, from which it can be inferred that this was regarded as a condition or quality of the holding. The only covenant (besides that for good husbandry, to which I have already adverted) which bears upon the subject is one which limits the quantity of the land to be broken up, or had in tillage, without the landlord's consent, to ten acres (plantation measure) out of 123 acres (statute measure), to be selected from certain specified parts of the farm. This excludes tillage; but it does not exclude the use of all or any part of the grass land for meadow or hay purposes as long and as often as such use may be consistent with good husbandry and may not involve injury or deterioration. That use would not, in my opinion, be "for the purpose of pasture." There is no covenant that any hay which may be made from the land shall be consumed on the farm; if there had been I should have agreed that this would be within the fair meaning of "pasture." But as long as the covenant for good husbandry is not broken, there is nothing, that I can see, to prevent all the grass grown upon the farm in any year from being made into hay and sold (if a market can be found for it) off the farm; nor is there anything even to shew that there would have been no market.

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(1) 18 Ir. Law Times, 24.

I think, for these reasons, that this holding has not been brought within the exception contained in sub-sect. 3 of sect. 58, and that the appeal ought to be dismissed with costs.

LORD BLACKBURN:—

My Lords, this is an appeal against an order of the Court of Appeal (in Ireland) affirming an order of the Common Pleas Division discharging a conditional order to change the verdict entered for the defendant at the trial before Lawson J. into a verdict for the plaintiff, or that the verdict should be set aside, and a new trial be granted on the ground of misdirection.

The action was by a landlord against his tenant to recover possession of a farm let for a term of twenty-one years, which expired on the 25th of March 1882. It was not disputed that, if the Land Law (Ireland) Act 1881 (44 & 45 Vict. c. 49) applied, the verdict was properly directed for the defendant. The question really was whether this holding was brought within the exception in the 58th section, "that this Act shall not apply to . . . . (3rd) any holding let to be used wholly or mainly for the purpose of pasture," and valued at an annual value of not less than £50. The valuation in this case exceeded £50.

The report of Lawson J. is as follows:—"This was an ejectment against an over-holding tenant whose lease expired on the 25th of March 1882. Mr. Bewley's certificate states the facts correctly, and I adopt it. I was not asked to submit any question to the jury, and I directed a verdict in favour of the possession for the defendant, reserving liberty to plaintiff to move to have the verdict entered for him."

I do not think I can state what took place at the trial more concisely than by reading that part of the certificate of Mr. Bewley which states it. [His Lordship read it. The certificate is set out above.]

The general question, what circumstances are admissible and sufficient to shew that a holding was "let to be used wholly or mainly for the purpose of pasture" within the meaning of the Land Law (Ireland) Act 1881, sect. 58, is one which must be of great importance in Ireland; but I take it the question which your Lordships have to decide in this case is much narrower, and is whether, on the facts admitted on the trial, it appears that this particular holding was let to be used wholly or mainly as pasture, in which case the verdict ought to be entered for the plaintiff, or whether there was evidence raising a question which the Court cannot solve as a matter of law, which, if answered in one way, would shew it was so let. So that the judge, though not asked to leave any question to the jury, was not justified in directing the verdict either way till that question was answered. In that case there should be a new trial.

Both Courts below have given judgment for the respondent, but we have not any authentic report giving their reasons. I regret this, for I do not doubt that these reasons, if we knew what they were, would furnish us with valuable assistance.

There is nothing that I can find in the objects of either the Act of 1881 or the Act of 1870, sect. 15, from which the words are taken, to throw any light on the construction of the words. Some portions of what is attributed to O'Brien J. in the "Irish Law Times," can hardly, I think, be correctly reported. When real property is let for a rent, the terms on which both parties contract regulate the way in which the real property is to be dealt with. In the absence of any express terms, the law implies, from the mere relation of landlord and tenant, that it is the duty of the tenant to do or to leave undone some things, and a promise is implied from the mere relation of landlord and tenant on which an action lies for a breach of that duty. The most important of these, in the case of an agricultural holding, are not to commit waste and to manage the property in a husbandlike manner. Lord Ellenborough in *Legh* v. *Hewitt* (1) says: "What shall be considered in farming as a good and husbandlike manner must vary exceedingly according to soil, climate, and situation."

The facts here given in evidence put an end to all questions as to waste and also completely negative an averment in the statement of claim that the lands at the time of the demise were ancient pasture lands. For the lands were demised by an indenture dated the 16th of July 1861, and it is not disputed that under a lease, dated the 27th of February 1852, which expired shortly before 1861, the entire of the farm had been broken up and put in tillage. And though it is stated, and not denied, that at the time of the demise in 1861 there were only fifteen acres in tillage and the rest was used as pasture, it is impossible to say that pasture which must have been laid down as such within the last ten years was ancient pasture. And this evidence also shews that though the land was such that it had for a long time been used as a pasture farm, there was nothing in the nature of the land to prevent its being all used in tillage. But the indenture of 1861, which was put in evidence, has express covenants which bind the tenant not, without the consent in writing of the landlord, to "break up or have in tillage in any one year any greater quantity of the said demised premises than ten acres plantation measure," that is, sixteen acres, or less than one seventh of the whole farm.

And it is expressly covenanted that the tenant shall "manage, till, and use the lands hereby demised in a good and husbandlike manner, and in due and regular course of good husbandry, so that the same may not be in any way injured or deteriorated." This, I think, is pretty near what would be implied by law; here it is expressed. I do not think it admits of dispute that the lands let under this lease were let to be used, as far as regards sixteen acres, or rather less than one seventh of the whole in tillage; and as regards the remaining six sevenths, to be used as land in permanent grass, unless with the consent in writing of the lessor. And I think it does not admit of dispute that if the holding was let to be used as to six sevenths in permanent grass,

(1) 4 East, 159.

it was let to be used *mainly* as grass. But the statute says "let to be used for the purpose of pasture." And though pasture is a proper and the more usual use of grass land it is not the only one.

It is not uncommon in leases and agreements for leases relating to the use of pasture land expressly to allow the sale of hay on certain conditions. An instance is to be found in *Smith* v. *Chance* (1), where the tenant held the pasture land on the terms "that he would consume the hay on the premises, or for every load of hay would bring two waggon loads of Worcester muck and spread the same." An argument was used, and dictionaries were cited in support of it, that if a tenant holding land on the terms in *Smith* v. *Chance* (1) had sold the whole of the hay and brought back the stipulated quantity of muck (which, at a time when there was a great and exceptional demand for hay, as there was to send to our army in the Crimea, such a tenant would probably do) he would still be using the land for the purpose of pasture, for it was said the hay must have been used by those who bought it to feed horses and cattle, and that it mattered not whether the cattle fed were on the land or elsewhere; but I do not think this is the natural or reasonable meaning of the words. The tenant in such a case is using the land as grass land certainly, but not, I think, for the purposes of pasture. I cannot therefore assent to this argument on behalf of the appellant.

An argument was used on the part of the respondent that, unless there was an express covenant in the lease, or, what would come to the same thing, a custom such as would cause a covenant to be tacitly in the lease so that the tenant could be sued on it if he did not use the land for pasture, it was impossible that the land could be let to be used for the purposes of pasture. As there is no such covenant in the lease, and no evidence of any custom which would cause such a covenant to be tacitly incorporated in the lease, this would, if the argument was well founded, put an end at once to the case.

A case of *O'Brien* v. *White* (2) before the Land Commission, decided on the 6th of February 1884, was cited, in which the Land Commission, reversing the judgment of the sub-commissioner, did say so. As that case was subject to an appeal, which may be hereafter argued, I neither express nor form an opinion either way on the merits of the case; but I think it right to say that I do not at present assent to the legal principle stated by O'Hagan J. in that case. He puts the case of a letting of land, and states the broad question to be "whether supposing the contract between landlord and tenant to be entirely silent as to any mode of user of the lands, but that in fact the land is of such a nature that it could not be rationally or profitably used otherwise than wholly or mainly for pasture, the exception in the statute applies." And he says, "The nature and capacity of the soil and its unsuitability to any other use than pasture, must, it was urged in the case now before us, have been present to the minds of both landlord and tenant at the time of the letting. Very likely it was present to their minds, but that it was present to their minds in the sense that it formed part and parcel of the bargain and created a covenant the infringement of which would be a wrong, is what we must be convinced of before we can hold that there is an implied contract." And both he and Mr. Litton lay it down that the contract being in writing was conclusive as to whether or not there was a contract on which the tenant could be sued, with which I do not quarrel; but they also lay it down that though the lands were of such a nature that they could not in the ordinary course of things be used except for pasture, they could not be held to have been let to be used as pasture unless the Court could imply a covenant that they should be used in that and no other way. I do not, as at present advised, agree in this.

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(1) 2 B. & Ald. 753.

(2) 18 Ir. Law Times, 24, 26.

There is very little to be found in the books of English law as to what is a sufficient indication of the purpose for which a thing is let. In the civil law and French law founded on it a lease of land was but one instance of the locatio rei, and according to that foreign law a contract on the part of the letter is implied that the thing, whether land or chattel, should be reasonably fit for the purpose for which it was let. There have been several cases in which the question has been discussed whether such a contract on the part of the letter was implied in English law. These cases, or most of them, will be found collected in Sir E. V.

Williams' Notes to Saunders, vol. ii., 838. The decision in *Hart v. Windsor* (1) was that there was no such contract on the part of the lessor of real property implied by English law. Now, in every case in which that question was raised, it must have been first decided that the property was let for a particular purpose. I cannot find in any of them that there was any discussion as to what was sufficient to shew the purpose. It seems generally to be assumed that a house is let for the purpose of being dwelt in, and garden or arable ground for the purpose of being cultivated; and certainly there is nothing that I can find to shew that anyone ever suggested that it could not be proved that lands were let for a particular purpose unless there was a contract on the part of the lessee to use them for that purpose.

The statute now in question was made applicable to lettings which had taken place at a time when it was not at all necessary for the lessor or lessee to express whether the letting was for one purpose or the other; and to hold that the purpose could not be shewn unless there was such a contract expressed in the written agreement would go far to defeat the purpose of the legislature when passing the 58th section. The proviso at the end of the 7th sub-section is strong to shew that the legislature did not mean to say land let on terms which make the tenant liable unless he use it wholly or mainly for the purpose of pasture, but precisely what they have said, "let to be used for" that "purpose."

I think the true guide, as to what is to shew the purpose for which the letting is, is very well and clearly expressed by Pothier. Though the effect of the purpose being shewn may be different in the foreign law from that which it has in English law, yet the reason and sense of the thing is very often to be found in the writings of the great Roman and foreign jurists.

Pothier says, Du Contrat du Louage, Nos. 22 and 23 (I translate, slightly abbreviating, from the 3rd volume of Œuvres de Pothier, par M. Dupin, p. 240): "No. 22. It is the essence of the contrat du louage that there should be a certain enjoyment or a certain use of a thing, which the lessor (locateur) binds himself to give to the lessee (locataire) during the agreed time. That is properly the object and substance of the contrat du louage. The kind of enjoyment or use which one gives by a letting bail is either expressed therein, or is not. When it is expressed therein the lessee cannot use the thing for any other use than that which is expressed in the letting. For instance, if a horse is let to you to go to Lyons, you must take it no further." "No. 23. Where the kind of enjoyment or of use is not expressed in the letting the contract is nevertheless enforceable. In such cases the object and substance of the contract is the kind of enjoyment or use for which the thing is by its nature destined, and to which it is usual to put it, 'auquel la chose est de sa nature destinée et auquel on a coutume de la faire servir.'" He proceeded to express an opinion that where the locataire is of a known profession or trade, it may make a difference; for example, a lease of a house in a village is, he says, to be taken to be let to be used as a house, and the lessee cannot set up a forge in it, but if it is let to the village blacksmith the presumption would be different.

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(1) 12 M. & W. 68.

There can, I think, be no doubt of the good sense of these observations. I suppose if two men hire, one a boat, to go from Maidenhead to Windsor, and the other, by exactly the same words, a dogcart, to go from Maidenhead to Windsor, it would need no contract on the part of the hirers to shew that the boat was let to be "used mainly for the purpose of travelling on the river," the dogcart upon the highway, for the things hired are each "de sa nature destinée" to these uses. And I think the case of *Harper* v. *Davies* (1), which was, I think, rightly decided, is a proper application of the doctrine of Pothier. The grass farm was let to a farmer by profession, and must be taken to have been let to him to be used so as to make a profit; and though there was no express contract to prevent the tenant from letting the grass rot upon the ground, or, though he could not sell the hay, making any use of the hay, which the ingenuity of counsel might suggest, though it was one that a tenant farmer would never think of; it was, I think, rightly held, that being debarred from selling the hay, it must be taken that the land was let to be used mainly as pasture, the meadowing being only ancillary to that, the only other purpose for which grass land was, from its nature, destined, and to which it was usual to put it. I do not follow the reasoning by which O'Hagan J. reconciles his decision in *O'Brien* v. *White* (1) with *Harper* v. *Davies* (2), and his own decision in *Cleary* v. *Gascoigne* (3).

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(1) Ir. L. R. 12 C. L. 23.

Had there been in the present case any contract, express or implied, that hay should not be sold, this case would be identical with *Harper* v. *Davies* (2).

It was argued that, as a matter of law, we know this much of good husbandry as to know that if grass land is mown and the hay sold away, the grass must be deteriorated. I think I may venture to assume so much knowledge as to say that that is so unless proper steps are taken to restore to the soil what is thus removed from it. But it was further urged that though, where from exceptional circumstances, such as facilities for irrigation, and more especially of irrigation with sewage, great crops of grass or hay might be sold off without the land being exhausted, these were quite exceptional circumstances, and not to be supposed to exist here, they not being proved or even suggested to exist. As far as regards irrigation, I am inclined to assent to this; but I am by no means prepared to say, as a matter of law, that it is not consistent with the rules of good husbandry, as applied to the management of grass land, to sell off the hay, bringing back and spreading on the land manure; nor that these particular lands were so situated that the tenant could not, without such an expenditure as would render it practically impossible, an expenditure which no tenant would incur, bring such manure to them. Such may be the fact, and it may have led to the approved practice of management of grass lands in that district of Limerick being in 1861 such that to use the lands otherwise than mainly for the purpose of pasture would not be to manage them in due and regular course of good husbandry. *Legh* v. *Hewitt* (4) is, I think, an authority that evidence to this effect would be admissible, and if evidence had been produced that in 1861 there was a custom in the sense explained in *Legh* v. *Hewitt* (4), making it not the regular and good course of husbandry in this part of Limerick to use the land otherwise than mainly for pasture, I think there would have been a question of importance to be considered. I do not think your

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(1) 18 Ir. Law Times, 24.

(2) Ir. L. R. 12 C. L. 23.

(3) 18 Ir. Law Times, 26 (note).

(4) 4 East, 159.

Lordships could be asked now to express any opinion as to how that question, if raised, ought to be determined; but I may go so far as to say that, if there had been such evidence as to raise the point, I should have, as at present advised, thought that there ought to be a new trial to consider its effect.

But the evidence here was no more than that the tenant did use this land as a dairy farm, using it in every way as the tenant in *Harper* v. *Davies* (1) did, except that he "sometimes" sold hay off the land. Taking it strongest against the tenant, that *sometimes* means very seldom, this comes to no more than that the tenant did use the lands mainly for the purposes of pasture. This is by no means inconsistent with its being the approved due and regular course of good husbandry in that district to use grass land mainly for the purpose of pasture; it may even raise a suspicion that such is the case, but does not raise the question so that the judge was called upon to dispose of it.

I therefore come to the conclusion that the orders appealed against were right, and should be affirmed.

LORD WATSON :—

My Lords, unless the appellant can shew that the holding in dispute is within the exception established by sect. 58 (3) of the Land Law (Ireland) Act, 1881, the provisions of that statute must apply to it. The appellant has, in my opinion, failed to satisfy the onus thus incumbent on him. The holding is proved to be of the yearly value requisite to bring it within the exception; but it has not been shewn, to my satisfaction, that it was "let to be used wholly or mainly for the purpose of pasture."

Notwithstanding the ingenious argument addressed to us by the appellant's counsel, in regard to the meaning of the expression "for the purpose of pasture," I have never seen any reason to doubt that the words "depasturage" in sect. 5 and sect. 58 (6), "pasturing" in sect. 17, and "pasture" in sect. 58 (3) and (4), of the Act of 1881, were all intended by the legislature to signify one and the same thing, viz., the grazing of cattle, or other live-stock, upon grass lands. But the fact that hay or green crop is raised on the holding for the exclusive purpose of maintaining the grazing stock during autumn or winter, will not in my opinion deprive it of the character of a grazing farm. I have had more difficulty in forming an opinion as to the meaning which the legislature intended to attach to the words "let to be used," as these occur in sect. 58 (3). Do these words refer to a use of the holding, forming matter of contract, express or implied, and therefore capable of being enforced by the landlord against his tenant: or do they merely refer to such use of the holding as may reasonably be held to have been contemplated by both parties, having due regard to the terms of the lease, the character of the subject let, and other similar circumstances?

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(1) Ir. L. R. 12 C. L. 23.

The question as to the particular use for which a holding was let may, as it appears to me, arise under these different conditions. First of all, the lease may prescribe, in express terms, the use or uses to which the tenant is to be limited. In the second place, even in the absence of express stipulation, there may be an effectual limitation of the tenant's right to one particular use, derivable by implication from the terms of the lease. In the third place, the lease may contain stipulations, pointing to a particular use of the land let, and binding upon the tenant in the event of his so using it, but not necessarily implying that he is debarred from making any other use of the land, so long as he observes the rules of good husbandry. And, in the fourth place, the lease may be altogether silent as to the purposes for which the holding is to be used, and may impose no obligations on the tenant other than those arising from legal implication, such as the custom of the district, or the rules of good husbandry.

Whenever the contract fixes, either expressly or by implication, the uses which the tenant is to make of his holding, it must, I apprehend, be conclusive as to the purpose for which the holding is "let to be used." The difficulties which I have felt in considering this appeal only relate to the third and fourth of the cases supposed. In these cases the contract permits the tenant to make any and every possible use of the subject let so long as he observes the stipulations or local customs applicable to such use and does not trangress the rules of good husbandry. If the purpose referred to in sect. 58 (3) must be an exclusive purpose, prescribed by the contract between the lessor and lessee, it follows that in none of these cases could it be held that the land was let to be used for any particular purpose. In that view a tract of hill country, quite unfit in any ordinary sense to be used for other than grazing purposes, would not, although the tenant never did use, and never dreamt of using it, except for grazing, be a holding let to be used mainly for the purpose of pasture, within the meaning of sect. 58 (3). There would be nothing in the contract to hinder the tenant from reclaiming the land and converting it at an enormous cost into an arable farm or a market garden: although it might be unreasonable or foolish to suppose that any tenant would do so. I cannot think that such was the intention of the legislature. It appears to me that in those cases where the particular purpose for which the holding is to be used is not defined by contract, the legislature must have intended that the purpose should be ascertained by reference to the use or uses which the contracting parties must as intelligent and reasonable men be held to have had in their contemplation when they entered into the lease.

I think the actual mode of occupation adopted by the tenant will always be an important factor in ascertaining for what, if any, particular purpose his holding was let to be used. If, without violating any of the conditions of his lease, the tenant were to occupy the holding mainly for agricultural purposes, it would be difficult, if not impossible, to hold that it had been let to be used mainly for the purposes of pasture. On the other hand, though the tenant were to use the land mainly for pasture it would not, in my opinion, necessarily follow that the holding had been "let to be used" for that purpose. I think it would be necessary in addition to the mere fact of use, to prove some facts in relation to the character and capabilities of the holding from which it might be inferred that the tenant could not reasonably have contemplated any other use. It is in this latter respect that the evidence which was adduced by the appellant in this case appears to me to be defective; and it is because of that defect that I have come to the conclusion that he has failed to establish that the holding in question was let to be used mainly for the purpose of pasture.

I am, therefore, of opinion that the appeal ought to be dismissed, with costs.

LORD FITZGERALD:—

My Lords, the question which this appeal brings before your Lordships' House arises on the 58th section of the Land Law (Ireland) Act 1881 sub-s. 3, and, like most questions on the construction of that statute, is of no small difficulty and may involve far-reaching consequences. The plaintiff's action, which was instituted in the High Court of Justice in Ireland on the 4th of April 1882 was to recover possession of a farm in the county of Limerick on the expiration of a lease, dated the 16th of July 1861 for a term of twenty-one years from the 25th of March 1861 which expired on the 25th of March 1882. The plaintiff in his statement of claim averred that the lands were ancient pasture lands at the time of the demise, and further alleged that "the lands were let to be used mainly for the purpose of pasture." The last allegation was made to bring the case within the 3rd sub-clause of sect. 58. The defendant took issue on both allegations. We may at once dismiss from consideration any question of ancient pasture. The material issue, on which the rights of the parties wholly depended, was whether the lands were let to be used mainly for the purpose of pasture. The trial took place at the Trinity sittings of 1882 before Lawson J. and a common jury of the city of Dublin. The facts have already been stated, but I am obliged to advert to them somewhat minutely.

It is to be observed, however, that the learned counsel, whose certificate has been adopted by the judge, does not appear to have duly appreciated the question to be tried, probably on account of his absence from the trial, for in stating the issues he does not notice in any way the only material issue in the case. [His Lordship then stated the facts set out above.]

It will be observed that the learned judge has not expressed any opinion as to whether there was any question proper to be submitted to the jury or on the legal merits, nor did he reserve liberty to draw proper inferences from the facts in proof, or give judgment for either party. The defendant being in possession, he directed a verdict in favour of that possession, and no more.

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On the 14th of November 1882 a rule nisi was obtained in the Common Pleas Division, that the verdict should be changed into a verdict for the plaintiff, or that a new trial be had for misdirection. On cause shewn the Divisional Court discharged the rule, confirmed the verdict, and gave judgment for the defendant.

The judgment of the Common Pleas Division we are informed was unanimous, but the note of the reasons expressed for the decision is so meagre as not to be reliable, and probably is not accurate. Your Lordships have not been able to eliminate the principle on which the judgment rested, save from one passage in which the very able judge (1) who delivered the reasons for that judgment is represented to have said that "for himself he was distinctly of opinion that where a tenant had the right of meadowing, his holding was not pasture land." I understand from that passage, as applicable to the particular case, that the learned judge was of opinion that as the lease of 1861 did not express any special purpose, and as it did not prohibit meadowing, the lessee had the right to meadow the whole or any portion of the farm, and therefore it had not been let "to be used mainly for the purpose of pasture."

The learned judge is also represented in his criticism on the Act of 1881, and on the particular exception in sect. 58, sub-sect. 3, to have said, "why, from that general policy, should have been excepted 'pasturage,' was not shewn, and in fact surpassed all reasonable comprehension." At present I will not follow the learned judge in that unprofitable inquiry, though I may say a word on it before I conclude.

The Divisional Court does not seem to have expressed any opinion as to whether the evidence at the trial raised any question proper to have been submitted to the jury.

The Court of Appeal affirmed the order of the Divisional Court. On the argument in the Appellate Court, counsel for the appellant was proceeding to discuss the question as it arose on the particular facts of the case, but the report says, "The Court declined to consider anything further than the terms of the lease itself, as no question had been left to the jury, whose province it

(1) O'Brien J.

was to draw an inference such as this." What the particular inference was does not appear.

It seems from the reason given in the judgment of the Court of Appeal, that the ratio decidendi was that, "on the face of the lease the tenant could treat the farm in a manner well known, namely, taking crops of hay off it and selling the hay," and that such a letting was not within the exception. The Lord Chancellor (Law) says, "Land let for purposes not of feeding cattle on it, but selling the grass and hay in the market, was not a letting for pasture in any sense of the word, and was certainly not within the exception of sect. 58." I do not dissent from that proposition. He adds, "If, as a matter of fact, from the circumstances of the farm it could be shewn that it could not and had not been used as a meadow farm, it was a jury who should consider that evidence and draw an inference of fact." I am not able to adopt the last proposition to its full extent, as it seems to me to import that, in order to raise a question for the jury in the case before us, it was necessary to shew that it was physically impracticable that the farm could be used as a meadow farm. We must not lose sight of the very terms of the statute on which the issue is founded, viz. whether the farm was let *to be used* wholly or mainly for the purpose of pasture. The Court of Appeal seems also to have come to the conclusion that there was no evidence given on the part of the plaintiff proper to have been submitted to the jury, and that, consequently, the judge at the trial was right in directing a verdict for the defendant.

I now return to consider the evidence. The plaintiff says he had known the lands for upwards of forty years, and that, since he had known the lands, they had always been used *as a pasture farm*. This stands uncontradicted, though it may have been qualified, as I shall afterwards point out. Forty years previous to the trial brings us back to 1842, so that there was evidence that from 1842 to the time of the trial the farm had been used as a pasture farm. That evidence, with the lease of 1861, constitutes the plaintiff's case. That lease demises 123A. 3R. 26P. statute measure, which, since 5 Geo. 4 c. 74, means the same as English measure, and contains covenants on the part of the lessee "to manage, till, and use the lands demised in a good

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and husbandlike manner, and in due and regular course of good husbandry, so that the same may not be in any way injured or deteriorated," and also that he will not, without the lessor's consent in writing, "break up or have in tillage or in course of tillage in any one year any greater quantity than ten acres plantation measure, and that such ten acres shall be selected from the portion of the said premises at present under tillage and the field adjoining the house at present occupied by the said Patrick Elligott, which field is supposed to contain about eight acres plantation measure, and are shewn upon the said map, and not elsewhere." The ten acres plantation measure would represent in quantity slightly more than an eighth of the entire farm, but to be selected from year to year within the ambit of the lots shaded red on the map.

The plaintiff closed his case with that evidence, and the defendant did not at that stage ask the learned judge to direct a verdict for him. The defendant then was produced as a witness, and gave the evidence already stated, but short as is the statement, it is wanting in accuracy; e.g., he says that since the date of the lease he had frequently meadowed different portions of the lands, but, though speaking of two leases, he does not specify which he means. And again, "and sometimes sold hay off the lands," would be satisfied by an occasional production and sale of a quantity in small excess of the requirements of his grazing cattle. The meadowing of about twenty acres would leave still for pasture ninety-five or ninety-six acres. The fair import seems to be that he meadowed about as much as was necessary for his cattle, and when occasionally the produce was more than he required he sold the surplus.

The important statement of the defendant is that he used the farm as a dairy farm. The defendant seems to have had the farm for about thirty years before the trial, and I interpret his last statement as embracing the whole of that time. It is to that that I alluded as evidence that might, perhaps, be taken as a qualification of the plaintiff's statement, but I should not deem it so, as I should infer, if it was open to me, that a dairy farm meant a pasture farm, that is to say, a farm under grass for feeding dairy cattle.

I now turn to the Chancery lease of the 27th of February 1852, on which the defendant relied, and which, as far as we know, was his first dealing with the farm, then being a pasture farm. It is made by the Master in Chancery for seven years pending the Chancery cause, and terminated at latest on the 25th of March 1859. The quantity demised is about three acres less than in the lease of 1861. That Chancery lease contains, inter alia, covenants on the part of the lessee to manage and cultivate in a proper and husbandlike manner, and that " he shall not break up or convert into tillage in any one year more than fifteen Irish acres of the said lands, under the penalty of £6 per Irish acre for each and every acre over and above the said fifteen acres which shall be so broken up or tilled in any one year, to be recoverable as the said rent, but whenever the said Patrick Elligott shall have laid down any portion of the said fifteen acres in a husbandlike manner with grass seeds, to the satisfaction of the said Thomas Bennett, the receiver, then that the said P. Elligott shall be at liberty to break up the said quantity of ground as he shall have so laid down."

It is to this provision that the defendant alludes in his evidence when he says he had broken up fifteen acres each year, and that the portion broken up extended over the entire farm, which I take to mean that he had each year broken up a new piece of fifteen acres, but then before he could do that lawfully he should have laid down that which he had broken up in the preceding year with grass seeds. The result would have been that whilst a fraction less than one-fifth might be in tillage, the remainder should be in grass. There was an interval of about two years and four months between the expiration of the Chancery lease by efflux of time and the execution of the lease of 1861, during which time we have no history of the occupation, but there is a statement in defendant's case on this appeal to the effect that during that interval he continued in occupation as yearly tenant, which probably is correct, and if he had used the farm otherwise than as a dairy farm during that time he would, no doubt, have so stated.

I desire now to make some observations on the provisions of sect. 58 of the Act of 1881, and on some other enactments, though I cannot say they aid much in answering the difficulty of O'Brien J.

The Act of 1881 adopts the provision contained in the 71st section of the Act of 1870, that the Act shall not apply to a holding which is not agricultural or pastoral, or partly agricultural and partly pastoral in its character. "Agricultural" probably means cultivated by tillage, but "pastoral" is a misapplication. It means in common parlance, rural, or rustic, or pertaining to shepherds. We may, however, give a free interpretation to the language of the legislature as substantially represented by two words, viz., "corn and cattle," "agricultural" meaning tilled land, and "pastoral" land in grass for feeding purposes. The farm in question was undoubtedly in its character partly agricultural and partly pastoral, and therefore not primâ facie excluded, but the 3rd sub-section of sect. 58 does except a holding "let to be used mainly for the purpose of pasture." It is to be observed that the Act does not except "pasture land" because of that character, but only when it is let to be used for the purpose of pasture. Thus if the land was described in the lease as 123 acres of pasture, that would be a good description, but it would not follow, unless more appeared, that it was let to be used for the purpose of pasture. What is pasture one year may be in tillage the next, and vice versâ.

No doubt, however, it may be an important element for our consideration in ascertaining the object and intention of the parties in the "letting," that the land then was, save as to fifteen acres, all pasture land, and had been previously used as such.

Then what is the meaning of the term "for the purpose of pasture"? We were supplied with a good many definitions of the word "pasture," and some went to the extent that it meant "land under grass," or even the grass itself without more, but I am prepared to adopt the ordinary and popular meaning that "for the purpose of pasture" means for the feeding of cattle, whether it be for grazing or fattening, or for dairy purposes. Some light is shed on the meaning of the term "pasture" by the 17th section of the Act of 1881, in which a tenant exercising "in common with other persons over uninclosed land a right of pasturing or turning out cattle or other animals," is spoken of as "exercising his right of pasture."

It was said in some of the cases to which we have been referred that the purpose of the letting should be either expressed or be necessarily implied, so as to form a part of the contract for breach of which the landlord might maintain an action or have an injunction against an apprehended breach, but I cannot agree in this, and adopt the answer given to it by my noble and learned friends opposite (Lords Blackburn and Watson). The distinction between a letting expressly for a limited purpose and the case in which land is let and usually used in a particular manner is indicated in sect. 4 of the Act of 1870, where it is said "Nor shall anything in this Act authorize any tenant, without the consent of the landlord, to break up or till any land or lands usually let, occupied, or used as grazing or grass lands, *or let expressly as grazing or meadow land*." The real question is, Did the parties on the occasion of the letting intend that the farm should be used mainly for pasture? That intention is to be collected from the contract, aided by the light of the then existing circumstances of the land, the custom of the country, and other then surrounding circumstances. If the contract does express the purpose of the letting, and is bonâ fide, then no question can arise. I have purposely said "and is bonâ fide," for I would not have it supposed that the mere insertion in the letting of the words "for the purpose of pasture" not in good faith, but merely to defeat the operation of the Act, would necessarily have that effect.

If, on the other hand, the contract is wholly silent as to the purpose for which the land is to be used, then it seems to follow that the tenant is at liberty to use the farm in any proper manner consistent with good husbandry, and so as not to be guilty of waste or deterioration, but even in such a case the circumstances may raise a question as to whether the land was so let "*to be used* for the purpose of pasture."

We have here, however, to deal with an intermediate case. The lease does not expressly state the purpose for which the land was to be used, but it is not wholly silent on the subject, as the covenants on the part of defendant ensure that about six-sevenths

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shall be in grass, and that the whole shall be dealt with in a proper and husbandlike manner. The issue on the trial lay on the plaintiff; he was to bring the case within the exception in sect. 58. The defendant availed himself of his position, not only by a traverse, but also of his statutable right, and pleaded, "I am in possession; prove your case."

The question I have proposed to consider is whether the evidence at the time was such as ought to have been submitted to the jury, and from which they might have reasonably inferred that the farm was let "to be used mainly for the purpose of pasture." I incline strongly to the opinion that there was such evidence.

The evidence establishes that, for about twenty-one years prior to the lease of 1861, the farm had been used as a pasture farm; that when let to the defendant under the Chancery lease in 1852 the letting was such as required that about four-fifths should be kept in grass, and that when again the lease of 1861 was made to him he was bound to keep about six-sevenths in grass, and permission to till a portion was not alone strictly limited in quantity but confined in locality. The defendant too tells us that he used the farm as a dairy farm.

We have had no explanation in evidence of what constitutes a dairy farm, and in the absence of such explanation we must interpret it on the present inquiry as meaning a farm used for the purpose of pasturing dairy cows, and thus producing milk, butter, and cheese.

I humbly conceive that the evidence, such as it was, ought to have been submitted to the jury, and that body might legitimately from that evidence have drawn an inference supporting the plaintiff's contention. My impression is not, however, so strong on this point as to lead me to dissent from the opinions already expressed by your Lordships.

The case seems to have been conducted on both sides at the trial without a proper appreciation of the real question, and presented on very deficient proof. There were many matters left wholly untouched by the evidence which might have materially affected the question, such as the nature, character, and capabilities of the farm, the husbandry customs (if any) of the district, and as to whether keeping the farm mainly in meadow from year to year, and selling the hay off it, even if it was reasonably practicable to supply a sufficient quantity of manure, would have been consistent with proper management and good husbandry. The defendant relied on this, that the lease did not forbid meadowing, and that therefore he might lawfully meadow the whole; but it seems to me, in face of the plaintiff's evidence, and having regard to the covenants in the lease, it lay on the defendant to offer some evidence that, consistently with good husbandry as practised in the district, he might lawfully have used the whole or the main portion for meadow.

There is one point only on which I am entirely free from doubt, viz., that the judge at the trial was right in declining to enter a verdict for the plaintiff. My impression is that he ought to have put the question to the jury.

Neither party asked to have any questions sent to the jury; that course was prudent on the part of the defendant, and probably the plaintiff did not put complete trust in the tribunal; but if there was evidence to raise the question, then the learned judge ought to have submitted it to the jury, though neither party asked him to do so. Then ought there now to be a new trial? Such a result seems to me to be desirable, inasmuch as it is plain that the question between the parties has not been really tried; and further, as the verdict is final on the issue and affects materially and for all time the character and probably the nature of the plaintiff's property in the farm. The answer, however, to this question has been already given. Your Lordships are of opinion that there was no sufficient evidence to raise any question for the jury; if so there was no misdirection, and if there has been a failure of justice it has been occasioned by the plaintiff's negligence and default.

I have adverted to the meaning to be put on "used as a dairy farm," in the absence of any explanatory evidence, but I am not to be understood that, if let to be used as a dairy farm, it would necessarily be brought within sect. 58, sub-sect. 3. We are not informed what a dairy farm in the county of Limerick may be. We may safely assume that dairy farms differ widely in their circumstances and mode of user, and probably the legislature had not such holdings in contemplation when enacting sect. 15 of the Act of 1870, and sect. 58 of 1881.

I am aware from my own judicial experience how much lettings of dairy farms vary. In some the letting is but for six or seven months, and is express in every particular to regulate the rights and duties of the parties; in others the landlord supplies the stock as well as the land (such a letting was not unknown in England: see *Wood* v. *Ash* (1)); in others, as it may have been in the present instance, the land is of that character that, if to be used in the most profitable manner, it should be used for dairy pasturage; and in modern times dairy farming is assuming more the character of a manufacturing business, to which mechanical skill and mechanical aids are necessary, than of mere farming. I wish to guard myself against appearing to express any opinion not necessary to the decision of the case before your Lordships' House, but desire to observe that there has been for centuries in Ireland an occupation known as that of a grazier. The grazier was a holder of grass land who used it mainly to feed cattle, not for the dairy, but for rearing and fattening cattle intended for the market. The grazier was never regarded very favourably; he gave but little employment to the labourer, and was somewhat migratory in his character. Your Lordships will find the grazier recognised in some Acts of the Irish Parliament; e.g., the statute 2 Anne, c. 15 (Irish) speaks of "the trade or occupation of a grazier" and amongst a number of other trade regulations, the wisdom of which is at least doubtful, prohibits a butcher from being also a grazier. The 31 Geo. 2, c. 8 (Irish) is an Act of a similar character, and prohibits salesmen in Smithfield from also following "the occupation of a grazier," and from both Acts we can see that the grazier was one who held land "and used it for the grazing and feeding of oxen or other cattle." The graziers were a numerous class, and held considerable farms for grazing purposes in all parts of Ireland, save perhaps in Ulster, and generally on very short terms, and if it was open to me to conjecture I should say that in all probability the exception in sect. 15 of the Act of 1870 was intended to apply to farms let to graziers for the purpose of grazing.

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(1) Owen, 139.

The exception in sect. 15 of the Act of 1870 is of very limited effect. It disentitles to compensation for disturbance, but leaves untouched the claim for improvements (if any). The grazier was generally one who had no fair claim to compensation for disturbance; his tenure was usually very short, and for a fixed period. He did not usually live on the farm, managed it probably by a herd, or perhaps two, and usually had no farm labourers. He practically was put to no real loss by migrating to another grazing farm.

Sect. 58 of the Act of 1881 was taken substantially in terms from sect. 15 of the Act of 1870, and may have been intended to apply to the same class and for the same reasons, but the legislature has used language large enough to include others than graziers, and we must give effect to that language.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 7th July 1884.

Solicitor for appellant: *E. J. Southern, for Norris Goddard, Dublin.*

Solicitors for respondent: *Batten, Proffitt, & Scott, for P. S. Connolly, Dublin.*

[HOUSE OF LORDS.]

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Aug. 4.

SIR JOHN SWINBURNE, BART. . . . APPELLANT;

AND

GEORGE MILBURN, ANN CLARKE, AND SARAH ELLIOT . . . . RESPONDENTS.

Landlord and Tenant—Lease for Lives—Covenant for Renewal on dropping of one or more Lives—Construction.

A lessor demised hereditaments to the lessee his heirs and assigns for the natural lives of the lessee and two other persons and the longest liver of them, with a covenant that the lessor his heirs and assigns (upon the lessee his heirs or assigns "surrendering this present demise as hereinafter mentioned") should at any time thereafter at the request of the lessee his heirs or assigns, "as often as one or two life or lives of and in the said hereditaments" should drop and be determined, renew and grant a further term "for any other life or two lives of any other person or persons to be nominated by the lessee his heirs or assigns in the stead of the persons life or lives so dropping or determining"; the lessee his heirs or assigns paying to the lessor his heirs or assigns "for every such renewal for every life or lives of such person or persons so to be renewed as aforesaid the sum of 40*s.* only, and at the same time surrendering this present demise to be cancelled":—

Held, reversing the decision of the Court of Appeal, that upon the true construction of the covenant the right of renewal was neither perpetual, nor limited to one renewal for not more than two new lives, but was a right of renewal as often as any of the three original lives should drop, so that any such renewal might take place either on the dropping of any one of the said three lives, or after the dropping of any two of them, as the lessee might from time to time request.

APPEAL by the plaintiff from an order of the Court of Appeal.

The appellant having brought an action against the respondents to recover possession of premises in Northumberland, by order of Field J. and by consent pursuant to Order XXXIV. rule 2 the following special case was stated.

1. By an indenture of lease dated the 24th of March 1827 Sir John Edward Swinburne—in consideration of the surrender of an indenture of lease dated the 4th of January 1780 whereby Sir E. Swinburne deceased demised and granted the premises in question to James Allgood his heirs and assigns for and during the

natural life and lives of James Allgood, Sir William Loraine, and the Rev. Lambton Loraine, and the longest liver of them (of which lives the said Lambton Loraine was still in being), of which lease the interest was now vested in Hector Goodfellow, and in consideration (inter alia) of £4 paid to Sir John Edward Swinburne by William Goodfellow—

Demised and granted to William Goodfellow his heirs and assigns the premises in question, viz., one fifth part of an acre together with the messuage and other buildings then or thereafter to be erected and built thereupon, together with the appurtenances, situate at Stamfordham, otherwise Stannerton, in Northumberland, then in the possession of Hector Goodfellow and more particularly described in the lease, "for and during the natural lives of the said William Goodfellow the surviving cette que vie and William Scott and Joseph Jordan for and during the natural life of every and each of them longest living," at and for the yearly rent of four shillings payable as therein mentioned.

2. In the indenture was a covenant on the part of the lessor in the words following:—"And also that the said Sir John Edward Swinburne his heirs and assigns (upon the said William Goodfellow his heirs or assigns surrendering this present demise as hereinafter mentioned) shall and will at any time hereafter at the request costs and charges of the said William Goodfellow his heirs or assigns, within the space of three calendar months after such request, as often as one or two life or lives of and in the said tenements hereditaments and premises with the appurtenances shall drop and be determined, renew fill up and grant a further term of and in the said premises for any other life or two lives of any other person or persons to be nominated by him the said William Goodfellow his heirs or assigns in the stead place and room of the persons life or lives so dropping or determining, he the said William Goodfellow his heirs or assigns paying unto the said Sir John Edward Swinburne his heirs or assigns, for every such renewal filling up or granting such further term for every life or lives of such person or persons so to be renewed as aforesaid, the sum of forty shillings only, and at the same time surrendering or delivering up this present demise to be cancelled."

3. Either party was to be at liberty to refer to the indenture of lease as part of the case.

4. The questions for the opinion of the Court were:—

1. Whether the lessee's right of renewal was limited to two new lives in place of two of those named in the lease; or extended to and included renewals whenever and so often as any life or two lives of and in the premises should drop and be determined; or in other words, was the covenant to be construed as one for perpetual renewal?
2. Whether upon a renewal the lessee would be entitled to have inserted in a new lease a covenant for renewal similar to the covenant above set forth.

The action stood over for final determination by Field J. until the determination of the above questions of law by the Court on the construction of the lease.

The Queen's Bench Division (Day and Smith JJ.) were of opinion that upon the first question the covenant was not to be construed as one for a perpetual renewal, and that to the second question no answer was necessary; and by an order of the 26th of November 1883 gave judgment for the plaintiff; the right of renewal being limited to one renewal for not more than two new lives in place of two of those named in the lease.

The Court of Appeal (Brett M.R. and Bowen L.J.) by an order of the 22nd of January 1884 rescinded the order of the Queen's Bench Division and set aside the judgment, with a declaration as to the questions in the special case; 1st, that the covenant in the lease was one for perpetual renewal; and 2nd, that upon a renewal the lessee was entitled to have inserted in a new lease a covenant for renewal similar (mutatis mutandis) to the covenant in the original lease; the costs of the special case and of the appeal to be dealt with by Field J. on further consideration.

July 10, 11. *Horace Davey* Q.C. (*R. S. Wright* with him) for the appellant:—

The words "upon the said William Goodfellow his heirs or assigns surrendering this present demise" govern the whole clause. The true meaning is that there should be one renewal only, to be granted at the option of the lessee on the dropping either of the first or of the second life. "For every such renewal" means for a renewal on the dropping of one life, or on the dropping of two lives; or possibly it means for every life so to be renewed, i.e., if the renewal took place on the dropping of the first life, there would be one new life and 40*s.* to be paid, if on the dropping of the second life, there would be two new lives and 80*s.* to be paid. "As often as" may be construed "at any time whatever." The Court of Appeal treated the words "upon the said William &c. surrendering this present demise" as unmeaning. They are plainly inconsistent with a right of perpetual renewal, and ought to prevail in the absence of clear and express terms conferring such a right, since the presumption of law is against perpetual renewal: *Baynham* v. *Guy's Hospital* (1); *Moore* v. *Foley* (2); *Harnett* v. *Yielding* (3); *Brown* v. *Tighe* (4). There is no case in which a perpetual right has been allowed where there were no words of perpetuity such as "for ever" or "at all times hereafter," or an agreement that the new lease should itself contain a similar covenant for renewal. In *Furnival* v. *Crew* (5) Lord Hardwicke held that a covenant for a renewed lease with like covenants included a repetition of the covenant for renewal, but the law has been since settled otherwise: *Iggulden* v. *May* (6). In *Hare* v. *Burges* (7) there was a covenant that the new lease should contain like covenants "including this present covenant." *Copper Mining Company* v. *Beach* (8) was reported as an authority upon another point many years after it was decided. In *Walmesley* v. *Pilkington* (9) there were stronger words than here, yet the Court held that there was no perpetual right. Even if the words "upon the said William &c. surrendering this present demise" be omitted an alternative construction may be suggested, that there is a right to renew for three lives. The meaning of the covenant, in this view, would be that a right

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(1) 3 Ves. 294, 298.

(2) 6 Ves. 232, 237.

(3) 2 Sch. & Lef. 549, 557.

(4) 2 Cl. & F. 396; 8 Bli. N.S. 272.

(5) 3 Atk. 83.

(6) 9 Ves. 325; 7 East, 237; 2 B. & P. (N. R.) 449.

(7) 4 K. & J. 45.

(8) 13 Beav. 478.

(9) 35 Beav. 362.

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is given to put in one life when any one of the original three dropped, or two lives if the lessee waited till two lives had dropped. This would be like the construction adopted in *Moore* v. *Foley* (1) and would give the following renewals, viz., one new life on the dropping of each life successively, or two on the dropping of the first two and one on the dropping of the third, or one on the dropping of the first and two on the dropping of the others. The words "as often as" and "for every such renewal" would be satisfied by a plurality of renewals without perpetuity: *Baynham* v. *Guy's Hospital* (2); *Moore* v. *Foley* (1); *Doe* v. *Hardwicke* (3). Another construction, which would be quite literal and give full meaning to every word, is that on one life dropping one or two lives might be put in, and the same when two lives dropped. The fact that the lease here is a renewal of a previous lease is immaterial. The House cannot resort to the previous lease for aid in the construction: *Kenny* v. *Forde* (4).

W. Barber Q.C. (*Pollard* and *F. J. Church* with him) for the respondents:—

There is no presumption of law against perpetual renewal, merely a leaning against it in construing covenants, which was stronger fifty years ago than now; 1 Platt on Leases 707, 708; judgment of Smith B. in *Brown* v. *Tighe* (5). No particular form of words is necessary to give a perpetual right; the question is what the parties have shewn that they intended. There are words of perpetuity, viz., "at any time hereafter," and there are words importing several renewals. But there is no alternative between a single renewal and perpetual renewals. If, as suggested, there may be three renewals, the argument from the words "upon the said William &c. surrendering this present demise" fails. In *Furnival* v. *Crew* (6) there were no words of perpetuity. *Baynham* v. *Guy's Hospital* (2) did not decide the point; moreover there was a proviso shewing that the right to renew was not to extend beyond the lives named, as was pointed out by Lord St. Leonards in *Sadlier* v. *Biggs* (7). *Hare* v. *Burges* (8) is a strong authority for the respondents, and the rule there laid down was approved and followed in *Roberts* v. *Mayne* (1) and in *Ex parte Clarke* (2). The most natural meaning of the words is in favour of the respondents' contention. "This present demise" must be construed "the present or existing demise at the time of the renewal."

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(1) 6 Ves. 232.
(2) 3 Ves. 294.
(3) 10 East, 549.
(4) Batty, 534.
(5) 2 Cl. & F. 405, n.
(6) 3 Atk. 83.
(7) 4 H. L. C. 435, 469.
(8) 4 K. & J. 45.

Davey Q.C. replied.

During the course of the argument the Lord Chancellor suggested the construction which the House ultimately adopted.

The House took time for consideration.

Aug. 4. EARL OF SELBORNE L.C.:—

My Lords, the Court of Appeal in this case has held that the lease of the 24th of March 1827 contains a covenant for perpetual renewal. The Divisional Court held it to be for one renewal only. The action was determined upon a special case, the questions submitted by which were stated as if no intermediate construction were possible, and the arguments in both the Courts below appear to have proceeded upon that footing. But there is, nevertheless, an intermediate construction open, viz. that the covenant was for as many renewals, either of one life only or of two lives at a time, as might be requested by the lessee upon the falling of each or any two of the three lives named in the indenture of the 24th of March 1827. This construction appears to me to be less open to objection, and better to satisfy the terms of the covenant, than that adopted in either of the Courts below.

The lease of 1827 was made to William Goodfellow for and during the natural lives of himself (inaccurately described as the surviving cestui que vie under a former lease then surrendered) and two other persons, named William Scott and Joseph Jordan, and the life of the longest liver of them. [His Lordship then read the covenant set out in paragraph 2 of the special case.]

As against a perpetual right of renewal, it is to be observed that there is nothing here which, either expressly or by necessary implication, points to perpetuity, if the words, "as often as one or two life or lives of and in the said tenements, &c., shall drop and

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(1) 7 Ir. Chan. 551.

(2) 6 Ir. Law Rep. Eq. 51.

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be determined," can be otherwise satisfied; and that there is no provision, as in *Hare* v. *Burges* (1), that any new lease shall contain a similar covenant for renewal. I am not inclined to adopt the language which is to be found in some authorities, to the effect that there is a sort of legal presumption against a right of perpetual renewal in cases of this kind; but those authorities certainly do impose upon any one claiming such a right the burden of strict proof, and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted.

Are, then, the words "as often as one or two life or lives of and in the said tenements, &c., shall drop and be determined," fairly capable of being limited to the three lives named in the lease of 1827? I think they are. These are the only lives which at the date from which the indenture speaks could properly be described as "lives of and in the said tenements," and I do not think there is enough to shew that other lives to be afterwards put in under the covenant by way of renewal were meant to be included. The words may reasonably be construed in the same way as if they had been "as often as one or two *of the* lives of and in the said tenements, &c.," in which case I think they would certainly have had reference to the particular lives named in the lease. This construction (which I adopt) gives full effect to the words "as often as," because it gives a right to three (or, at the option of the lessee, two) successive renewals; and it appears to me to be the construction most consistent with such authorities as *Moore* v. *Foley* (2) and *Doe* v. *Hardwicke* (3).

I am unable, therefore, to assent to the conclusion of the Court of Appeal, that this is a covenant for perpetual renewal. But neither can I agree with the Divisional Court, that it is a covenant for one renewal only. That construction appears to me to be inconsistent with the plain and natural sense of the words "as often as," which properly signify an event which will recur, at all events, more than once. They cannot, in my opinion, be satisfied by merely giving the lessee an option to take a single renewal after the falling either of one life or of two lives. It does not seem to me consistent with reasonable probability that where the lessee was, at all events, intended to have a right (if he chose) to put in two new lives, provision would be made for his electing to waive that right, and to put in only one, which would be the only effect of the alternative if there could be only one renewal.

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(1) 4 K. & J. 45.

(2) 6 Ves. 232.

(3) 10 East, 549.

The Divisional Court appears to have been mainly governed by the consideration, that the actual lease of the 24th of March 1827 could be surrendered only once, which is no doubt true; and it is also true that the surrender which was a condition of renewal was (in terms) to be of "this present demise." But although that demise could only be surrendered on the first renewal, the substance of the condition would be complied with by then surrendering it; and provision would naturally be made in each renewed lease for another surrender, when there was a further renewal. To hold that the form in which this condition is expressed is enough to justify a departure from the natural meaning of the words "as often as," in the lessor's covenant, would be in my opinion "hærere in cortice."

I think, for these reasons, that the order appealed from ought to be reversed, except so far as it rescinds the order and sets aside the judgment of the Queen's Bench Division; and that for the declaration therein contained, a declaration should be substituted that the covenant in the lease is for renewal, not perpetually, but as often as any of the three lives for which the lease of the 24th of March 1827 was granted should drop and be determined, so that any such renewal might take place either on the dropping of any one of the said lives, or after the dropping of any two of them as the lessee might from time to time request. And with that declaration, remit the case to the Queen's Bench Division, for that Court to deal with the costs of the action and of the appeal to the Court of Appeal, and to enter up judgment as may be just, on further consideration of the action.

I think there should be no costs of the appeal to this House.

LORD BLACKBURN:—

My Lords, the question in this case depends entirely on the construction of a covenant, very inartificially and confusedly expressed, contained in a demise under seal made in 1827, whereby

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the appellant granted to William Goodfellow, "for and during the natural lives of the said William Goodfellow the surviving cette que vie and William Scott and Joseph Jordan" for their lives and the life of the longest liver. If the surviving cestui qui vie is to be read as a description of the Rev. Lambton Loraine, who, as is mentioned in the recital, was the surviving life of three on which the same property had in 1780 been granted to James Allgood, this is a grant for four lives, one of whom, Loraine, must in 1827 have been old, and must have long since died. If, as seems most likely, it was an inaccurate falsa demonstratio attached to the name William Goodfellow, it is a grant for three lives only. I do not think it makes any difference on the construction of the covenant whether the demise is for four or three lives.

If there was a covenant to renew in the recited lease, we are not told so. But if there was it was not pursued, as the grant is not for two new lives, and the surviving life of the three, but for three new lives, either in conjunction with Lorraine or without him. Even therefore if *Cook* v. *Booth* (1) was not distinctly overruled in *Iggulden* v. *May* (2) it could have no application in this case.

The main question is on the true construction of the covenant, and is, I think, whether it is sufficiently shewn by the words used that the agreement was that there should be a perpetual renewal.

The covenant, though clumsily expressed, is, I think, up to a certain extent clear enough. The lessor covenants that he will, at the request and cost of W. Goodfellow, his heirs or assigns, and within three months after such request, when one life has dropped, on the payment of one fine of 40*s.* grant a further term for the surviving lives, and one new life, or if two lives have dropped, on the payment of £4 grant a further term for the one surviving life and two new ones, the lessee paying the fines and surrendering this present demise. A renewal to that extent at least is, I think, certainly stipulated for. If all three lives have been suffered to drop, the demise is at an end.

It is implied, I think, though not expressed, that the fresh terms shall, mutatis mutandis, be like the present, but that is not enough to express that it shall contain a covenant to renew

(1) 2 Cowp. 819. (2) 9 Ves. 325; 2 B. & P. (N. R.) 449.

(*Moore* v. *Foley* (1)), and there are no words of a like effect to those which in *Hare* v. *Burges* (2) were, I think rightly, held to express that the new lease was to contain a similar covenant to renew.

But I think that it would be sufficient to give a perpetual renewal if the words used in the covenant indicate that the agreement between the parties was that there should be renewals for ever. No technical words are required, nor were there in *Furnival* v. *Crew* (3) express words to that effect, though those which Lord Hardwicke had in that case to construe seem to me to shew such an agreement as strongly as anything short of express words could do. The words "for ever" are not necessary, but it is necessary that the idea should be sufficiently expressed by the words used, and I think if it was agreed that there should be two or three renewals but not renewals for ever, that would be effectual if sufficiently expressed.

The words of the covenant now in question are that the lessor "will at any time hereafter" grant a renewal "as often as one or two life or lives shall drop," and that the tenant shall "for every such renewal" for every life pay 40*s*. These words are certainly not so applicable to a single renewal that must be necessarily made during the existence of one of the three lives once and once only, and which, though the request may be made on the dropping of any one or any two of the lives, which may happen twice, is not so aptly met by the words "as often as" as it would be by the word "whenever." On the other hand, if a covenant for perpetual renewal was intended, the words "surrendering this present demise" must be moulded to mean, or at least to include, "from time to time surrendering the then existing demise." There is therefore some inconsistency in the expressions used, and, when that is the case, the Court, in construing the instrument, has a difficult task, the burthen is on those who seek to mould or alter words actually used.

I think that when one construction would shew that the parties had come to an agreement which, though quite fair and legal, is unusual and not so likely to be in the minds of the parties as the other, the burthen on those who contend for that construction is considerably increased. And I think it is established by the authorities that in England at least a perpetual renewal is, as contrasted with a limited renewal, of that character.

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(1) 6 Ves. 232.
(2) 4 K. & J. 45.
(3) 3 Atk. 83.

I assent to the criticism on the words used entirely obiter by Lord Brougham, when Lord Chancellor, in this House, in *Brown* v. *Tighe* (1). He expresses it too strongly. Nevertheless I think that the burthen is increased.

If I could be of the opinion which the two judges of the Court of Appeal have come to, that the intention of the parties clearly was that there should be a perpetual renewal, I should agree in their conclusion, but I cannot agree in that opinion. The alternative construction which the Lord Chancellor adopts was not thought of by the parties, and I should conjecture does not make any practical difference to them, though it makes the difference of the costs of the appeal. The reasoning of the Lord Chancellor leaves my mind in a state of great hesitation, so great that I do not dissent from the proposed judgment, though I think if it depended on my judgment alone I should prefer to restore the finding of the Divisional Court.

LORD FITZGERALD:—

My Lords, upon the special case the only question which it is actually necessary to determine is whether the covenant in question is to be construed as one for perpetual renewal. The second question was not pressed, and if it had been there is abundance of authority against the proposition of the defendants which that question imports.

The first question turns altogether on the construction of the covenant in the lease of the 24th of March 1827, and I do not propose to apply to it any rule of interpretation that would not be applicable to any other covenant or agreement. Mr. Barber, for the respondents, admitted, and I think properly admitted, that the burden lay on him, by which I understood him to mean only that he was bound to shew with reasonable clearness from the language of the covenant, aided by anything to be found in the other parts of the deed, that the parties intended to create a right of perpetual renewal. If that is once made clear then the presumption, if any, founded on inconvenience disappears.

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(1) 2 Cl. & F. 417.

The tenure by lease for lives with covenant for perpetual renewal was not usual in this country, but was very common in Ireland, and at one time was said to have affected about a sixth of the whole country. Whatever its origin may have been, it has been recognised by the statute law of Ireland for over two centuries, and there certainly never was in the Courts of that country any presumption against what was commonly known as a lease for lives renewable for ever, and on the contrary it was much favoured. In the numerous cases which arose in Ireland on the construction of covenants alleged to be for perpetual renewal, I have not been able to call to mind a single one in which the covenant was interpreted to be of that character, unless it contained sufficient evidence of intention by the use of words importing perpetuity, such as "for ever" or "from time to time for ever hereafter," or some other expressions of a like or equivalent character.

In this country, where the tenure was comparatively unknown and had not been made the subject of any statutable provision, it seems at one time to have been considered that there was some sort of presumption against it; but we can only recognise that to the extent that the party claiming this peculiar perpetual interest has the onus cast on him of shewing with reasonable clearness from the terms of his deed that the covenant he relies on was intended by the parties to be a covenant for perpetual renewal.

The terms of the covenant in question have been so fully criticised by your Lordships that I shall only repeat that there are no words to be found in it sufficiently importing "perpetuity," and we must do violence to some of its provisions before we could put on it the interpretation of "perpetuity," such for example as "surrendering this present demise," and at "the same time surrendering or delivering up this present demise to be cancelled."

The argument for the defendants went principally on the words "as often as," which may be otherwise satisfied, and to which full effect has been given by the intermediate interpretation put on the whole covenant by the Lord Chancellor.

I concur in the decision and in the reasons of the Lord Chancellor.

Order appealed from reversed except so far as it rescinds the order and sets aside the judgment of the Queen's Bench Division: for the declarations contained in that order the following declaration substituted, namely, "that the covenant in the lease is for renewal, not perpetually, but as often as any of the three lives for which the lease of the 24th of March 1827 *was granted should drop and be determined; so that any such renewal might take place either on the dropping of any one of the said lives, or after the dropping of any two of them, as the lessee might from time to time request." Cause remitted with that declaration to the Queen's Bench Division for that Court to deal with the costs of the action and of the appeal to the Court of Appeal, and to enter up judgment as may be just, on further consideration.*

Lords' Journals 4th August 1884.

Solicitors for appellant: *Pattison, Wigg, & Co., for George Armstrong & Sons, Newcastle-on-Tyne.*

Solicitors for respondents: *J. E. & H. Scott, for Bush & Wilson, Newcastle-on-Tyne.*

[HOUSE OF LORDS.]

CUNLIFFE BROOKS & CO. . . . . . APPELLANTS;

AND

THE BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY . . } RESPONDENTS.

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Building Society—Borrowing Powers—Overdrawing Banker's Account—Payments to withdrawing Members—Lien, equitable—Rule in Clayton's Case (1 Mer. 572).

A benefit building society which had no power to borrow money, was allowed by its bankers to make large overdrafts. In 1876 a memorandum was signed by the officers of the society and confirmed by the directors stating that certain deeds of borrowing members which had been deposited with the bankers were deposited not only for safe custody, but as a security for the balance from time to time. In 1881 an order for winding-up the society was made, and the bankers claimed to retain the deeds as security for the balance of their account. No evidence was given as to the application of the money which was drawn out by the society; but it was admitted that some part was applied in payment of members withdrawing from the society, and the remainder in payment of salaries, legal expenses, and expenses of mortgaged property.

The Court of Appeal held that the overdrafts were ultrà vires, being a borrowing not authorized by the rules, and not properly incident to the course and conduct of the society's business for its proper purposes; and that the bankers were not creditors of the society in respect of the overdrafts; but that they were entitled to hold the deeds as a security for repayment of so much only of the moneys advanced by them as was applied in payment of the debts and liabilities of the society properly payable and had not been repaid to the bankers, excluding payments to withdrawing members; that the burden of proving this lay on the bankers, and that in satisfying that burden the bankers could not have the benefit of the rule in *Clayton's Case* (1 Mer. 572).

The Court of Appeal made an order accordingly, directing inquiries; with a declaration that in making the inquiries the bankers were to be charged with all sums received by them on account of the society since it ceased to have any balance to its credit with the bankers, and that they were not to be allowed any sums advanced by them since that date which were applied in making payments to withdrawing members or otherwise than in paying such debts and liabilities of the society as aforesaid. The society did not appeal against the order; the bankers did.

Without expressing any opinion upon the question of payments to withdrawing members, or the bankers' right to hold the securities, *held*, that the decision and order of the Court of Appeal were in other respects right.

APPEAL from an order made on the 9th of November 1882 by the Court of Appeal (Lord Selborne L.C., Jessel M.R. and Cotton L.J.), which is set out in the report of the case below (1). The respondents did not appeal against any part of the order. The action was brought by the respondents under the circumstances detailed in the report of the decisions below (2); the facts material to this report are stated in the headnote.

The rules of the society which were referred to in argument before this House were as follows: By rule 1 the value of each share should be £10. Members might subscribe for any number of shares.

"2. All subscriptions, when they amount to one pound, upon investment accounts, shall bear interest at the rate of five per cent.; when they amount to five pounds, they shall bear interest at six per cent. (provided the funds permit), to be added at the annual audit, but such interest or dividend shall not be paid until the shares are realised or withdrawn. The directors shall have power to alter the rate of interest to be divided . . . .

"3. Any member of this society shall be allowed to withdraw (provided the funds permit) sums not exceeding £10, by giving seven days' notice, and sums exceeding £10 by giving one month's notice, according to the printed form in the schedule annexed. No further liabilities shall be incurred by the society till such member has been repaid."

"19. The affairs of the society shall be under the management of the directors, three of whom shall form a quorum. The directors shall meet as often as necessary, and shall determine all matters arising in the management of the society, subject, nevertheless, to the provisions of rule 48. No director shall vote on any question relating to his individual conduct or interests. The directors shall be empowered to appoint agents, surveyors, or solicitors in any part of the United Kingdom, and shall also be authorized to make any special arrangements as to advances and the repayment of advances."

"29. A general meeting of the members of the society shall be held in the month of June in every year, at such time and place as the board may appoint. At this meeting the report of the board and a statement of the accounts made up to the last subscription day in April, and duly audited, shall be submitted, and afterwards printed for distribution. Directors also shall be elected for the ensuing year in accordance with rule 20."

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(1) 22 Ch. D. 72, 73. In line 5 of p. 73 insert "any" after "whether."

(2) 22 Ch. D. 61.

"34. The directors may make advances, as the funds permit, to any amount, repayable by fortnightly contributions, according to the following table :—

. . . .

"35. Advances may also be made at a premium of £1 per share, to be added to the principal, in which case simple interest at the rate of £5 per centum shall be charged on the annual balances. These advances shall be repaid by fortnightly subscriptions of not less than 8s. for every ten shares or £100; but the member shall be at liberty to pay any amount exceeding that sum. *In case of repayment before ten years, a return shall be made at the rate of one-tenth of the premium for each year short of that term.*

"36. Members requiring an advance shall furnish particulars of the property proposed as security, and the security having been accepted by the board, and all other preliminaries being arranged, the advance may be made in one sum, or if required for building, the same may be paid by instalments, upon the certificate of the surveyors, as the building proceeds.

"37. Should any member be desirous of purchasing property about to be sold by auction, and require the assistance of the society to enable him to pay the deposit money, the Board may appoint a director or other officer to attend such sale, and (provided that such member can buy the property at a price not exceeding the sum certified by the surveyors) to pay the amount of the deposit; the balance of the advance to be paid when the mortgage is completed. If the member shall bid a larger sum than that named by the board, the difference shall be deposited by him in the hands of the officer representing the society before any deposit is paid or agreed to be paid on behalf of the society. The board shall take such legal security as they may be advised for the sums paid as deposits."

"41. If any borrowing member shall become in arrear for the amount of six fortnightly contributions, the board or trustees shall have power to take possession of the property, and sell the same by private contract or public auction, or collect the rents and reimburse the society, and, after paying all expenses, hand over the balance, if any, to the defaulting member.

"42. In case any premises mortgaged to the society be left incomplete, or do not progress in a manner satisfactory to the board, the board or trustees shall have the power to employ any person or persons to complete the same, and the money expended and laid out in so doing shall be considered as covered by the original mortgage; and the said board or trustees shall also have the option of selling and disposing of the premises mortgaged, either in their incomplete state or upon the same being so completed as aforesaid."

"46. Any member desirous of redeeming the securities held by the society shall be at liberty to do so upon payment of all sums then due from him for subscriptions, fines, and interest, and also of the present value of the future repayments as ascertained by the consulting actuary. All expenses incurred upon every sale, exchange, or redemption of any property shall be borne and paid by the member.

"47. An account shall be opened, in the names of the trustees, with such bankers as the directors shall determine from time to time. All money received shall be paid into the bank when it amounts to £10. All payments shall be made by cheque on the bankers, signed by one trustee or two directors, and countersigned by the secretaries."

July 17, 18. *Rigby* Q.C. and *Horace Davey* Q.C. (*H. B. Buckley* with them), for the appellants:—

There are two principal questions involved in this appeal: 1. Whether the mode in which the directors of the society conducted the banking account was within the powers of the society, was, in fact, authorized by the rules. 2. Whether the declaration in the order of the Court of Appeal can be maintained. As long as it stands it prejudices the bankers, not only in this action but in another which has been brought, and in which the bankers have been held liable to the society in a large amount for moneys advanced. The effect of this order is that if £100 were standing to the credit of the society with its bankers, and the society drew

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a cheque for £200 which was advanced to a member, so as to make an overdraft of £100, and the next day the society paid in £100, the bankers must honour a cheque for that £100 so paid in, and could not treat it as a repayment of the overdraft. The Court of Appeal was wrong in not allowing the application of the rule in *Clayton's Case* (1).

As to the first point, the overdrafts of the bankers were not strictly speaking borrowings, but simply the necessary operations of the society in working a banking account, and these operations they were authorized by the rules to make, looking at the nature of the business and the course of dealing. Such a business cannot be carried on profitably except in such a way; the only sources of income being from the interest paid by advanced members and the £1 premium under rule 35.

The society could only apply the funds in loans for ten years at 5 per cent. with 10 per cent. premium. It had to pay expenses of management, and interest at 5 and 6 per cent. on shares. The margin is so small that the society could not work at a profit unless the business was very large, and this it could not be unless it was able to pay withdrawing members at the proper time. In practice they waived the notice required by rule 3. Without a right to overdraw such payment could not be insured. As to withdrawal, see *Brownlie* v. *Russell* (2). The words "provided the funds permit" in rule 3, were held to mean, not if there was cash in hand but if the society was solvent: *In re Blackburn and District Benefit Building Society* (3). The Court of Appeal there held that this was not a case of overdraft but of a bargain for a loan. There is a distinction between overdrafts and loans: *In re Cefn Cilcen Mining Company* (4) and *Waterlow* v. *Sharp* (5); where there was a limit to the borrowing power; while here there is none. In *Agnew* v. *Murray* (6) there was not the reason there is here for overdrafts, for the rules contemplated that there might not be money to pay withdrawing members, and made provisions for that event.

On the first point, the borrowing was, in the words of the Lord

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(1) 1 Mer. 572.
(2) 8 App. Cas. 235.
(3) 24 Ch. D. 421.
(4) Law Rep. 7 Eq. 88.
(5) Law Rep. 8 Eq. 501.
(6) Ante, p. 519.

Chancellor in this case (1) "properly incident" and reasonably necessary "to the course and conduct of the business for its proper purposes." As the society allowed 5 or 6 per cent. interest it must at least make as much (or the business could not be carried on at a profit); and could not therefore allow large balances to lie idle at the bank. Suppose a man wants to borrow £1000 and the society has only £900 at the bank, are they to send him elsewhere for want of £100, when they will have more than the odd £100 coming in the next week? To lend the £1000 is a mere anticipation of the money that is expected, and is quite different from borrowing large loans for the purpose of swelling the capital. Such a course of business is not really increasing the capital. By rule 36 the money required for building may be advanced by instalments. Is the member to be told when an instalment becomes due that he must wait till there is a balance at the bank? It is impossible to foresee precisely when such advances will be wanted, because they are payable upon the surveyors' certificates. The members of the society having with full knowledge assented to the course of dealing cannot now object to it: *Phosphate of Lime Company* v. *Green* (2).

On the second point, assuming that the directors were acting improperly in keeping such a banking account, the account cannot be split up, it must be taken as a whole. The bankers have no means of knowing to what purposes the cheques drawn on them are to be applied. It is contrary to the first principles of equity to leave one part of the account standing and not the whole. The order should at least be varied by allowing the bankers to bring into account all moneys paid to withdrawing members and to advanced members. The payments to withdrawing members are liabilities, those to advanced members may or may not be, according as they were or were not made in pursuance of previous contracts. That members who have given notice of withdrawal are creditors was held by the Court of Appeal in the winding-up of this society: *In re Blackburn and District Benefit Building Society* (3), and payments to them are therefore payments of the society's liabilities. Consequently the order now under appeal was wrong in excluding such payments.

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(1) 22 Ch. D. 70.

(2) Law Rep. 7 C. P. 43.

(3) 24 Ch. D. 421.

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Sir *F. Herschell* S.G. and *Ince* Q.C. (*T. Snow* with them) for the respondents:—

As to the first point, there can be no distinction between an overdraft and a loan, whatever may have been said to the contrary by Stuart V.C. in *Waterlow* v. *Sharp* (1); doubt was thrown on that case by *Looker* v. *Wrigley* (2). The rules give no express power to borrow, nor can any power be implied; it must be expressly given: see *In re National Permanent Building Society* (3) and the judgments of the Lord Chancellor and Lord Blackburn in *Agnew* v. *Murray* (4). No member has a right to call on the society to advance, they may advance if they please, but they are not bound to advance. The words in rule 3 "provided the funds permit" cannot have meant "provided the society is solvent," for the rules could not have contemplated the continuance of the business in a state of insolvency. Certainly the words in rule 34 "as the funds permit" could not have that meaning. The borrowing was therefore ultra vires, and the decision of the Court of Appeal was right. There is no cross appeal and the respondents cannot now dispute that the bankers are entitled to the lien which the Court of Appeal has allowed them; but no authority has been cited for such a lien.

Upon the second point the order for an inquiry and an account was made in favour of the bank, not of the society. The order was right, payments to withdrawing members are not payments of liabilities, and the decision in *In re Blackburn and District Benefit Building Society* (5) might be shewn to be wrong, if it were necessary, which it is not, because upon taking the account in the present case the balance was found to be against the bankers, even allowing them the benefit of payments to withdrawing members.

Davey, Q.C., replied.

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(1) Law Rep. 8 Eq. 501.
(2) 9 Q. B. D. 397.
(3) Law Rep. 5 Ch. 309, 312.
(4) Ante, p. 519.
(5) 24 Ch. D. 421.

The House took time for consideration.

Aug. 1. Lord Blackburn:—

My Lords, the Blackburn and District Benefit Building Society was established under 6 & 7 Will. 4 c. 32, and the rules were duly certified. The 47th of these rules is in these terms: "An account shall be opened in the names of the trustees with such bankers as the directors shall determine from time to time. All money received shall be paid into the bank when it amounts to £10. All payments shall be made by cheque on the bankers, signed by one trustee or two directors, and countersigned by the secretaries."

The respondents, who are bankers, agreed to open an account with the trustees. In all banking accounts the bankers, so long as the balance of the account is in favour of the customer, are bound to pay cheques properly drawn, and are justified, without any inquiry as to the purpose for which those cheques were drawn, in paying them. But they are under no obligation to honour cheques which exceed the amount of the balance, or, in other words, to allow the customer to overdraw. Bankers generally do accommodate their customers by allowing such overdrafts to some extent; when they do so the legal effect is that they lend the surplus to the customer, and if the person drawing the cheque is authorized to borrow in this way on account of the customers, the bankers can charge the amount against those customers and their principals, and can make available any securities which, either from the general custom of bankers or from a special bargain, they have to secure their account.

The bankers in the present case were at the time they opened the account aware that the managers of the society, the trustees and directors, had all the authority to bind the funds of the society and its members which was given by the rules, and no more. If the rules authorized a course of business which necessarily, as an incident to that business, required that the persons acting for the society should incur liabilities, the funds of the society would be bound to make payment of those liabilities.

It was pointed out that not only was it incident to the business of this society to incur liabilities to outside creditors, as they are perhaps not very happily called, but also that, by rule 36, the managers of the society were authorized to agree with a member to make him an advance, of which, when it was for the purpose of building, part was to be paid as the building proceeded, and that when the time came when the building had advanced to the stage at which an instalment was payable, the member would have a right to complain of breach of contract unless he was paid, and that this was a case in which, therefore, a liability to the member might properly be incurred; and a somewhat similar argument was founded on the 37th rule. And it certainly might happen, without any moral guilt on the part of the managers, though I think hardly without miscalculation, that those liabilities might become payable when, owing to the subscriptions not being paid so promptly as the managers expected, there was not money at their bankers sufficient to meet that liability. But I do not think that the possibility of such liabilities being incurred clothed the managers with a general power to borrow for the purpose of discharging the liabilities.

It was argued that overdrawing a bank account, or, as it was called, taking advantage of banking facilities, was not like other kinds of borrowing, and two decisions of Stuart V.C., *In re Cefn Cilcen Mining Company* (1) and *Waterlow* v. *Sharp* (2), were cited as authorities for that. I am not sure that I quite understand how far the Vice-Chancellor meant to go, but if he did mean this in any sense that would affect the present case I cannot agree with him.

If any one is going to give authority to pledge his credit for an advance, it might be prudent to limit that authority to borrowing from the bank where he kept his account, as the authority would in that case be less likely to be abused; and when framing the rules, if any power to borrow was to be given by them, it might be prudent to limit it to a power of borrowing from the bankers only, and only by overdrawing the banking account, but I cannot see that borrowing is the less borrowing because it is from the bankers. If it could be shewn that the course of business authorized by the rules was such as to give, as incidental to it, a power to borrow, it would be authorized, though not expressly authorized. I do not think it can be said that it is necessarily incident to the business described by the rules that there should be a power to borrow, though liabilities may be incurred which it would be convenient to pay off at once before the funds of the society came in. Any person, whether the bankers or any one else, might pay off the creditors and stand in the shoes of the creditor who is paid off.

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(1) Law Rep. 7 Eq. 88.

(2) Law Rep. 8 Eq. 501.

I think, therefore, that on the main question whether the bankers are creditors against the society for the overdrawn balance, the Vice-Chancellor of the county palatine and the Court of Appeal, who agreed with him, were right.

As I have already intimated, there could not, in my opinion, have been any objection made against the claim of a person who, whether at the request of the managers or without it, and whether a banker or not, paid off one to whom the society was liable, and either by express or implied bargain purchased the claim of the person who was paid off. He would not be entitled to claim as lender of the money; but he would be entitled to claim as assignee of the creditor whom he had paid off.

The Court of Appeal, in the present case, held that though there was nothing that amounted to an assignment to the bankers of the claims of those who were paid off by the money advanced, yet if it could be shewn that such claims were in fact paid off thereby, there was an equity in substance to give them, the bankers, the same benefit as if there had been such an assignment. This is an important decision. It seems to be justice; whether it is technical equity is a question which, I think, is not now before this House.

The Court of Appeal gave directions as to how the account should be taken so as to work out that equity. The account has been taken as directed, and the bankers are, according to that account, not entitled to hold the title deeds for anything. That being so the now respondents did not appeal against that part of the order, and this House cannot consider whether it was right or not. I do not mean to suggest any doubt as to the correctness of the decision, but merely to point out that the decision of the

Court of Appeal is not and cannot be affirmed by this House. It retains its full force as a decision of the Court of Appeal not appealed against.

In taking the account there was a direction that the bankers "were not to be allowed any sums which were applied by the society in making payments to withdrawing members, or in any other manner except in payment of such debts or liabilities of the society properly payable." It was argued that in *In re Blackburn and District Benefit Building Society* (1), the Court of Appeal had decided that payments to withdrawing members were, or at least might be, liabilities of the society. I understand that this case is now under appeal, and if that is so I would avoid prejudging that appeal by expressing or even forming any opinion unless it was required for the decision of the case now before the House. It appears from the account taken that even if all the payments to withdrawing members were allowed, the balance on the account would remain very much against the appellants. It is therefore, as it seems to me, not necessary to form any opinion on this point.

I am by no means sure that I understood the various objections which were taken to the mode in which the account was directed to be taken. If it had been made out that it ought to have been taken in some other way more favourable for the appellants, I think the House ought to vary the order by directing the account to be taken in that manner. But if I correctly understand the nature of the equity which the Court of Appeal have by their order, unappealed against as far as regards this, decided to exist, the account gives the appellants everything to which they could be entitled in taking that account.

I therefore come to the conclusion that the order appealed against should be affirmed, and the appeal dismissed with costs.

LORD WATSON :—

My Lords, notwithstanding the very able argument addressed to us by counsel for the appellants, I am of opinion that the Court of Appeal has rightly decided that the directors of the society had no authority to raise money by making overdrafts upon the banking account kept, on behalf of the society, with the appellants' bank.

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(1) 24 Ch. D. 421.

The constitution of the Blackburn Society is governed by the Act 6 & 7 Will. 4, c. 32, and the rules of the society, certified in terms of that statute, do not expressly confer upon its managers any powers of borrowing. The House had occasion in the recent case of *Agnew* v. *Murray* (1) to consider the provisions of 6 & 7 Will. 4 with reference to the question of borrowing powers; and I understood the noble and learned Lords who decided that case to be of opinion that, whilst these provisions did not preclude the members of a benefit building society from authorizing their managers to borrow for the legitimate purposes of the society's business, the managers could have no such authority unless it were given them by the rules.

The appellants' counsel did not dispute that the directors of the Blackburn Society had no power to borrow, in the sense of raising money by loans, with the result of increasing the available capital of the society. But they maintained that overdrafts are not, in any proper sense, loans; that the right to keep and operate upon a banking account implies power to overdraw, in order to meet the temporary necessities of the society's business; and, at all events, that such a power was necessary and incidental to the carrying on of the business of the Blackburn Society in the manner prescribed by its rules.

I must confess my inability to understand the proposition that an advance made by a banker to a customer, whose account is overdrawn, does not constitute a borrowing and lending, in the strictest sense of the words. It is, no doubt, a particular mode of borrowing, and is frequently resorted to by business men, not for the purpose of obtaining a permanent loan, but temporary accommodation; still, it may be used so as to add to the capital and so to increase the liabilities of the borrower.

The 47th of the society's rules provides for the opening of a bank account in the name of the trustees, and directs that "all money received shall be paid into the bank when it amounts to

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(1) Ante, p. 519.

£10. All payments shall be made by cheque on the bankers, signed by one trustee, or two directors, and countersigned by the secretaries." That is obviously a provision for the safe keeping of the funds of the society, and does not contemplate the drawing out of moneys by cheque, beyond the amount actually paid into bank. But it is argued that the nature of the business which the society was formed to carry on necessarily required that the bank account should be operated upon in a way not contemplated by rule 47. There does not, however, appear to me to be any peculiar feature in the business contemplated by the rules of the Blackburn Society, which can distinguish it, in that respect, from the business of any other society constituted under the Act 6 & 7 Will. 4. According to the rules, its business was to consist in receiving contributions from subscribing members, and lending the money derived from that source, upon mortgage, to borrowing or advanced members. That is just the kind of business which is contemplated by the Act of William IV., and it appears to me that to give effect to the argument of the appellants would be equivalent to holding that the directors of every benefit building society under that Act, seeing that they must have an implied power to place their spare cash in bank, instead of keeping it themselves, and to draw it out as required, must also have power to borrow from the bank, by means of overdrafts upon their account current.

The alleged necessity for an implied power to overdraw, in the case of the Blackburn Society, was mainly rested in argument upon these considerations; that it was incumbent on the directors to pay to subscribing members on their shares being realised or withdrawn, at least 5 per cent. on the amount contributed by them, and 6 per cent. if the funds would permit; that the rates of interest chargeable by the rules against borrowing members were so calculated that its amount would be insufficient to pay to subscribing members the sums to which they were entitled unless the funds of the society were constantly lent out; that funds do not always fall in at the time when borrowing members require advances, and consequently that the object of keeping the funds continuously invested could not be attained except by getting

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temporary accommodation from the bank. That argument ignores the fact that by the 2nd rule the directors have "power to alter the rate of interest to be divided;" so that in reality the rules do not give to subscribing members any right to a higher rate of interest than the profits actually earned will admit of. Even if it were not so I should still be of opinion that no case of necessity was made out. It might possibly be expedient to give directors power to overdraw; but that is a matter for the members of the society to consider. With such a power the directors might earn larger profits; but they might also carry on a more speculative and hazardous business.

An account was opened with the appellants' bank in January 1874 in the name of the trustees; and from that time until the beginning of May 1878 the balances fluctuated, the account being occasionally overdrawn to a very large amount. On the 1st of May 1878 there was a balance of £795 17*s.* 7*d.* at the credit of the society; but on the 4th of that month, £1205 18*s.* 10*d.* was drawn out, leaving a balance of £410 1*s.* 3*d.* at the society's debit. From that date until the liquidation in 1881 the account continued to be overdrawn; moneys were paid in from time to time, but at no time thereafter was the balance in favour of the society when cheques were presented and paid. The Court of Appeal has held that in the present suit the appellant is to have credit for so much of the moneys advanced to the society as was applied in payment of debts or liabilities of the society properly payable, and had not been subsequently repaid; and has directed an inquiry to be made, in which the appellants are to be charged with all sums received from the society since the time when the society last ceased to have a balance at its credit, and "are not to be allowed any sums advanced by them to the order or on account of the said society since the same time which were applied by the said society in making payments to withdrawing members or in any other manner except in payment of such debts or liabilities properly payable as aforesaid." The appellants object to this last direction, and maintain that, in equity, they are entitled to have credit for all moneys advanced by them on overdraft, which were applied in satisfying the claims of with-

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drawing members, because these were proper liabilities of the society.

If it were possible, in the present suit, to determine the whole questions which have arisen, or may yet arise, between the parties in regard to these advances by way of overdraft, your Lordships would have many important questions to consider. But the sole object of these proceedings at the instance of the liquidators is to recover certain assets of the society, which are held by the appellants, in security of the advances made by them. Although the directors had no power under the rules to impledge these assets, the Court of Appeal has given the appellants an equitable lien to cover their advances so far as these were applied in payment of proper debts and liabilities of the society, excluding payments to withdrawing members; and that decision is not appealed from. I do not feel inclined to stretch the rules of equity farther in favour of the appellants. Besides, it was admitted by their counsel that the appellants could obtain no practical benefit from a decision in their favour, in regard to payments to withdrawing members, because it would not have the effect of bringing out a balance to their credit upon the account taken for the purposes of the present case.

It was urged for the appellants that they would be prejudiced by the order of the Court of Appeal in other questions between them and the liquidators. I am of opinion, however, with your Lordships, that the judgment of the Court of Appeal was not meant to determine, and does not determine, the extent of any legal or equitable claims which the appellants may have in respect of their advances, but merely the extent of the equitable lien which they are to have over the assets of the society which form the subject matter of this suit. Whether, and if so, to what extent the account current prior to May 1878 can be opened up and readjusted; whether the appellants have an equitable right to securities of the society acquired by means of advances from the bank; whether they have an equitable claim, either as creditors of the society, or as standing in place of withdrawing members, for advances applied in payment to them on withdrawal, are questions which cannot be determined in this suit, and which are not, in my opinion, prejudged by the order of the Court of Appeal.

Lord FitzGerald:—

My Lords, on the principal question raised before us, viz., whether the appellants were creditors of the society for the overdrawn balance, I am of opinion that the very able judgment of the Vice-Chancellor of the Palatine Court was correct in law. The Court of Appeal so far agreed with the Vice-Chancellor. There being no power to borrow, and consequently no debt created that could be enforced against the society, and no lien created by the instrument of deposit, I do not find it necessary to express any opinion on the supposed equitable lien to give effect to which the special directions contained in the order of the Court of Appeal were framed. The respondents do not complain of it and have not appealed.

The special directions given and the mode of taking the accounts prescribed by that order are now, on this appeal, unimportant, as it seems that in any mode of taking the prescribed account the result would not have been favourable to the appellants.

I abstain from expressing any further opinion.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 1st August 1884.

Solicitors for appellants: *Gregory Rowcliffes & Co.* for *Addleshaw & Warburton, Manchester.*

Solicitor for respondents: *H. G. Field* for *W. Danger, Liverpool.*

[HOUSE OF LORDS.]

CAYZER, IRVINE & CO. (OWNERS OF THE STEAMSHIP "CLAN SINCLAIR") . . . . } APPELLANTS;

AND

CARRON COMPANY (OWNERS OF THE STEAMSHIP "MARGARET") . . . . . } RESPONDENTS.

H. L. (E.)
1884
Aug. 1.

Ship—Navigation—Collision—Negligence—Contributory Negligence—Thames Rules, No. 23.

Rule 23 of the Thames Rules is not confined to the seaward side of "a line drawn from Blackwall Point to Bow Creek."

The order of the Court of Appeal reversed and the order of Butt J. restored, on the ground that even assuming (but without deciding) that the construction put by the Court of Appeal upon rule 23 was correct and that the *Clan Sinclair* had transgressed that rule, yet such transgression was not the cause of the collision: that ordinary care on the part of the *Margaret* would have enabled her to avoid the collision, and that she alone was to blame.

APPEAL from an order of the Court of Appeal reversing an order of Butt J. in the case of *The Margaret* (1) and (2).

The action was brought in the Admiralty Division by the appellants against the respondents in respect of a collision off Blackwall Point.

The appellants' steamship, the *Clan Sinclair*, came out of the South West India Dock on the north shore of the Thames nearly opposite the curve of Blackwall Point about 1.30 P.M. on the 9th of March 1883, and proceeded down river against the tide under her own steam and with a tug attached, at about three to four knots through the water. The respondents' vessel the *Margaret* was at the same time steaming up the river with the tide at from five to six knots over the ground. The collision took place under the circumstances stated in the reports of the decisions below (1) and (2), and in the judgments in this House.

Butt J. held that the *Clan Sinclair* had not broken rule 23 of the Thames Rules and that the *Margaret* was alone to blame (1).

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(1) 8 P. D. 126.

(2) 9 P. D. 47.

The Court of Appeal (Brett M.R., Baggallay and Lindley L.JJ.) held that upon the true construction of rule 23 the *Clan Sinclair* had broken it in not easing so as to prevent herself from proceeding lower down the river than was necessary, when she first ought to have seen the *Margaret;* and they held that both vessels were to blame (2).

The heading which precedes rule 17 of the Thames Rules 1880 is as follows (3):—

> "Bye-laws and Rules regulating the navigation of the river between Yantlet Creek and a line drawn from Blackwall Point to Bow Creek."

> "Rule 23. Steam vessels navigating against the tide shall before rounding the following points, viz. . . . . . Blackwall Point, ease their engines and wait until any other vessels rounding the point with the tide have passed clear."

July 25, 29, 31, Aug. 1. *C. Russell* Q.C. and *Myburgh* Q.C. (*F. W. Hollams* with them) for the appellants:—

Rule 23 did not apply: but if it did it had not a statutory force. The rule did not apply, (1), because the *Clan Sinclair* was outside the "line drawn from Blackwall Point to Bow Creek." That line (as appears by the heading to rule 17) is the limit of the application of rules 22 and 23. There is a good reason for this; because vessels coming out of the docks at the north side of the river on the land side of that line ought not to be subject to such a rule. This point was not taken in the Court below. (2.) The rule does not apply where a vessel has already begun to round the point. The judgment of Butt J. was right on this question. The Court of Appeal were wrong in assuming (as they seem to have done) that 36 & 37 Vict. c. 85 s. 17 applied to the present case, as was the case in *The Libra* (4); and *Stoomvaart Maatschappy Nederland* v. *P. & O. Steam Navigation Company* (5), and *The*

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(1) 8 P. D. 126.

(2) 9 P. D. 47.

(3) All the rules are set out in 5 P. D. 276.

(4) 6 P. D. 139.

(5) 5 App. Cas. 876.

Magnet (1). Even if rule 23 did apply the breach was not the breach of 36 & 37 Vict. c. 85 s. 17: *The Harton* (2); see also *The Sisters* (3). But assuming it does apply and has not the statutory sanction, the breach of it is only equivalent to the breach of a common law rule, and if the *Margaret* could by ordinary care (as she certainly could) have avoided the consequence of the breach by the *Clan Sinclair* of the rule she ought to have done so and is liable; *Dowell* v. *General Steam Navigation Company* (4); *Davies* v. *Mann* (5); *Tuff* v. *Warman* (6); *Spaight* v. *Tedcastle* (7); *Radley* v. *London and North Western Railway Company* (8). The Court of Appeal disregarded the doctrine established by these cases, assuming (without argument) that rule 23 had the force of a statute and that the breach of that rule was equivalent to the breach of a statute.

R. E. Webster Q.C. and *C. Hall* Q.C. (*Dr. Phillimore* with them) for the respondents, were stopped on the question whether rule 23 applied to the locality in which the vessels were when the collision occurred.

The construction put by the Court of Appeal upon rule 23 is correct. The *Clan Sinclair* having broken this rule is liable for the consequences. It would be no answer (even if it were the fact, which it is not), that this breach of rule 23 did not cause the collision. The principle of the doctrine of contributory negligence is not and never has been the same in the Admiralty Courts as at Common Law. The doctrine of *Davies* v. *Mann* (9) and that class of cases has no application in the Admiralty Courts, where the principle is that where both vessels are to blame the damages are equally divided, and the degree of blame on one side or the other is never inquired into. Once shew contributory negligence in a vessel, that vessel is liable: *Hay* v. *Le Neve* (10). That case is also an authority for the proposition that where there

(1) Law Rep. 4 A. & E. 417.
(2) 9 P. D. 44.
(3) 1 P. D. 117.
(4) 5 E. & B. 185, 206.
(5) 10 M. & W. 546.
(6) 5 C. B. (N.S.) 573.
(7) 6 App. Cas. 217.
(8) 1 App. Cas. 754.
(9) 10 M. & W. 546.
(10) 2 Shaw, Sc. App. 395.

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is blame the presumption is that it contributed to the disaster: the onus is on the defaulting vessel to shew that it did not.

[LORD BLACKBURN referred to *The Fenham* (1) per Lord Romilly M.R.]

There is abundant evidence that the breach of rule 23 in fact contributed to the collision.

Myburgh Q.C. in reply:—

The Fenham (1) was decided under sect. 298 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) and this explains the observations in the judgment. That was a night collision and the breach was a want of lights: a very different case to the present.

LORD BLACKBURN:—

My Lords, in this case, which has occupied a good deal of time, it appears to me that the principal point to which we have to direct our attention is the question of fact which is involved, for I think that it is more a question of fact than a question of law.

The first thing to be considered is, what is the meaning of rule 23 of the rules and bye-laws for the regulation of the navigation of the River Thames? That rule is, "Steam vessels navigating against the tide shall, before rounding the following points" (including Blackwall Point) "ease their engines and wait until any other vessels rounding the point with the tide have passed clear." I may first of all mention a point, not raised below, on which the House did not require that any answer should be given by the respondents' counsel; it was this: The rules for the navigation of the River Thames down to rule 16 apply, some of them, to all the navigation of the River Thames, and some only to the navigation of particular parts of the river. After rule 16 there comes this heading, "Bye-laws and Rules regulating the navigation of the river between Yantlet Creek and a line drawn from Blackwall Point to Bow Creek." Now the effect of that heading no doubt is to say, that the rules which immediately follow it, including rule 23, primâ facie are only to apply to vessels when they are lower down than the line drawn from Blackwall Point to Bow Creek; a glance at the chart will shew that a line drawn from Blackwall Point to Bow Creek would exclude the greater part of what, in any view of the words, is to be taken as being Blackwall Point, which the vessels are to round. The *Clan Sinclair*, although rounding Blackwall Point, never was in fact to the seaward side of the line from Blackwall Point to Bow Creek; and therefore it was contended that rule 23 did not apply; but I think it is impossible to put that construction upon rule 23, which in express terms says, that "steam vessels navigating against the tide shall, before rounding Blackwall Point, ease their engines and wait;" and it is impossible I think to construe that as meaning that Blackwall Point is to be excluded from that rule. It is a clumsy mode of expressing the intention of the framers of the rule (and they should have provided against it), but they must have intended that the heading confining these rules to below a line drawn from Blackwall Point to Bow Creek shall not apply to rule 23. That necessarily follows, because it is regarding the rounding of Blackwall Point.

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(1) Law Rep. 3 P. C. 212.

Now as to what is the rounding of Blackwall Point, we have, I believe, all the information which can be given to us by the production of the Ordnance survey and the Admiralty chart. I take the Ordnance survey as it is nearest to me, and I think that upon looking at it any one will find that after you have come down the river and have passed the Isle of Dogs, you come where the course of the Thames is north with a little west in it, in a line nearly straight, which may be called a reach. Then the course of the Thames curves round, and at a point below a line drawn to Bow Creek, somewhere below the point, the course of the River Thames is south with a little east in it in what may be also called a reach. So that these two parts of the river are not parallel to each other, but they are very nearly parallel, and any vessel that comes from the one reach of the river to the other must necessarily go round the intervening land. That intervening land, I take it upon the authority of the Ordnance survey, which I think is good authority for it, is called Blackwall Point, and I cannot doubt in my own mind that it is the Blackwall Point to which the rule is referring.

Now as to what is meant by that rule, that is a question upon which I would not willingly here unnecessarily pronounce any decisive opinion, because, before doing so, one should have more definite ideas than I quite possess as to what were the objects of seamanship which made those who framed the rule give that direction. I think it is quite plain from their direction that they were of opinion, and I have no doubt were quite rightly of opinion, that the vessels taking a sweep round those points would be in some danger if they both kept up their full speed there, and for reasons which no doubt are quite sufficient reasons, they thought that the right course for preventing that danger was to direct that when a vessel was going against the tide, and was aware that another vessel was coming round the point, it should not go on at full speed so that both should turn at once, but that it should ease and wait, whatever that easing and waiting meant.

But the first question upon which there seems to be some difference of language, if not of opinion, between the judge of the Admiralty Court and the Master of the Rolls, is, as to what is the meaning of "before rounding" and "ease their engines and wait until any other vessels rounding the point with the tide have passed clear." Now I cannot bring myself to think that the judge of the Admiralty Court is right in the opinion which he seems to have expressed (I do not say whether he entertained it or not), that the meaning of the rule was that the vessels which were in the straight, or nearly straight reach, before they began to turn at all, were to wait there until all vessels that might be seen across the land coming in the opposite direction had passed. The effect of that, I think, would be very inconvenient, and would be to hamper the navigation very much, because all the vessels going down the river would remain gathered together in one spot until all that were coming up had passed by; and it is not the meaning which I should have attributed to the words. I think the fair meaning would be pretty nearly (I will not say quite) what is expressed by the Master of the Rolls, that you begin to round when there is so much curving and rounding of the river that the vessels going down the river begin to turn round the land, they then begin to round, and when they have come so far down that the curving of the river ceases and they go straight, they then cease to round. How much the rounding is to be before the rule applies is a question which I would rather not decide until it becomes necessary to do so, but in my view of the rule here it would certainly begin somewhere before you come as far down as the spot where the *Zephyr* was lying, and I should be inclined to think that it was not necessary to begin so early as the point opposite the mouth of the dock out of which the *Clan Sinclair* came.

Now taking that to be the case, it would follow that when you are applying the rule to this case of the *Clan Sinclair* coming down there, there was a part of its course during which the rule would apply to it, and when it should consequently have eased and waited. What the easing and waiting means is a matter of some difficulty. The fact that the vessel is to ease and wait when it is aware that another steamer is coming round with the tide implies that those who have the charge of the vessel are to keep a better look-out than would generally be cast upon them by law, because they are to look out and see whether any other steamers are coming up with the tide on the other side, although those steamers are then so far away that you only see them across the land, and that consequently it would not be necessary to notice them or to report them except for this rule. That is only material as getting rid of the question whether the blame, if blame there was, was entirely that of the pilot. I pass by that, only observing that that is the effect of it.

Now when we have got that we have to see whether there was blame on the part of the *Clan Sinclair*, identifying, for this purpose and for the reason I have already indicated, the *Clan Sinclair* with its pilot, and not identifying it with the pilot any more. Upon that it does seem that there was a time (I will not say how long before) when the pilot of the *Clan Sinclair*, if the look-out had reported it to him, would have been made aware that there was another vessel coming up with the tide, which if they both went on their course would meet it when rounding. That being so, there was a time earlier than the time at which he knew it

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when he ought to have eased and waited, whatever that may mean. I think myself that the question how much he would ease and wait is a question of degree. I think there can be no doubt that the rule cannot be construed in such a way as to require those who have the management of the ship to stop and cast anchor. It cannot mean that they are to ease their engines and cease to work them so far as to lose all control over the ship. That would be an absurd conclusion, and it would be productive of very great danger. They must keep some way on in order to have some control over the ship. There does seem to be a difference between the judge of the Admiralty Court and the Master of the Rolls as to what degree of control they should keep. I think that the judge of the Admiralty Court and his naval assessors, acting upon the idea that there might be some way beyond what was necessary to keep mere steerage way, to keep the control, came to the conclusion that you might give a reasonable latitude to the rule, and that you were not to say that that rule was transgressed unless it was exceeded considerably. The Master of the Rolls seems to have laid it down as his view that it was necessary (I do not know exactly why) in order that the rule should be observed at all to construe it very strictly, and that, therefore, the speed necessary to keep control was not to be exceeded at all. I do not know which of the two is the right view. I myself should be rather more inclined to agree with the judge of the Admiralty Court, Butt J., than to agree with the Master of the Rolls, but I do not think it necessary to decide that point. But either way there would be a question of degree. It may be that the speed here may have been greater than it ought to have been; but then comes the question, If the rule was transgressed in that way, was that transgression of the rule the cause of the accident? Now upon that I think there is no difference between the rules of Law and the rules of Admiralty to this extent, that where any one transgresses a navigation rule, whether it is a statutory rule, or whether it is a rule that is imposed by common sense, what may be called the common law, and thereby an accident happens of which that transgression is the cause, he is to blame, and those who are injured by the accident, if they themselves are not parties causing the accident, may recover both in Law and in Admiralty. If the accident is a purely inevitable accident not occasioned by the fault of either party, then Common Law and Admiralty equally say the loss shall lie where it falls, each party shall bear his own loss. Where the cause of the accident is the fault of one party and one party only, Admiralty and Common Law both agree in saying that that one party who is to blame shall bear the whole damage of the other. When the cause of the accident is the fault of both, each party being guilty of blame which causes the accident, there is a difference between the rule of Admiralty and the rule of Common Law. The rule of Common Law says, as each occasioned the accident neither shall recover at all, and it shall be just like an inevitable accident; the loss shall lie where it falls. Admiralty says, on the contrary, if both contributed to the loss it shall be brought into hotchpotch and divided between the two. Until the case of *Hay* v. *Le Neve* (1), which has been referred to in the argument, there was a question in the Admiralty Court whether you were not to apportion it according to the degree in which they were to blame; but now it is, I think, quite settled, and there is no dispute about it, that the rule of the Admiralty is, that if there is blame causing the accident on both sides they are to divide the loss equally, just as the rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls.

Now upon that there must always be a question whether or not, if there is neglect shewn of any rule, that neglect is the cause of the accident. Upon that the case of *The Khedive* (2) has been referred to. In that case the rule was a rule by statute, and it was enacted positively that if the rule was not obeyed, the breach of it should in itself be deemed to be blame. When the statute imposing the rule is short of that, it is necessary to see that the actual transgression has been in fact the cause of the accident to some extent (it does not matter how much), and that is a matter of proof. I do not think that the judges of the Court of Appeal for a moment meant to say that the transgression of this rule was in itself sufficient

(1) 2 Shaw, Sc. App 395.

(2) 5 App. Cas. 876.

unless it was an occasion of the accident, but I do think that their attention not having been called to it they forgot that though there was a transgression of a rule, it was not necessarily the cause of the accident which afterwards happened. If they had had their attention called to that they would surely have mentioned something about it in their judgments. It seems to me to be the most important and difficult point in the case. They would surely have given some ground for saying that they thought the transgression of the *Clan Sinclair*, and which in their view was slight, was the cause of the accident, but they did not say a syllable about it. It seems to have been hastily assumed that if there was blame attributable to the *Clan Sinclair*, it must have been the cause of the accident. Not one word is said about it. There was no attempt to say that any authorities shew that the rules of the Court of Admiralty and the rules of a Court of Law as to what amounts to being a fault occasioning the accident differ in the slightest degree. The nature of the thing of course requires that in applying those rules you should look to what the nature of the accident is and to what the neglect is. If it is two ships, they are to be governed by the same rules of law and of evidence as if it was two carts in the street; but when you come to apply that you must remember that a ship is a thing which cannot be stopped in an instant like a cart, and cannot be moved from one side to the other like a cart; and when you have to look out for miles instead of looking out for yards, the application of the rules becomes very different. Upon that the only case I am aware of which seems to point to there being any difference between the rules of Law and of Admiralty is the case of *The Fenham* (1), where there are expressions used by Lord Romilly, then Master of the Rolls, which seem to point to his having thought that the burthen should lie upon those who infringed a rule to shew that the infringement was not the cause of the collision. Now I am not at all sure that with proper qualifications and proper restrictions that would not be a fair enough rule when applied to such a thing as a collision at night where there was an absence of lights. But when you come to apply it to such a case as this and say that it is shewn that the

(1) Law Rep. 3 P. C. 212.

Clan Sinclair and the *Clan Sinclair's* people are blameable for this loss (and it is only for this purpose that I am identifying the *Clan Sinclair* with the *Clan Sinclair's* pilot) because the *Clan Sinclair* ought to have eased sooner and waited sooner, I do not think it at all follows, as a reasonable rule of evidence, to say that that occasioned the accident unless the *Clan Sinclair* can shew that it did not occasion the accident.

[His Lordship then discussed the evidence and came to the conclusion that the *Margaret* was to blame, in attempting to pass the *Clan Sinclair* in the place and manner she did.]

Then it is said that the collision was owing to the *Clan Sinclair* being where it was. Undoubtedly in one sense that is so. If the *Clan Sinclair* had been some hundred yards higher up the river, the fact which made it a matter of rashness for the *Margaret* to run where it did run would not have existed. But that is not a sufficient ground for saying that the fact of the *Clan Sinclair* being there was the cause of the accident. The *Clan Sinclair* would not have been there at the time when it was there if it had not been that that vessel did not ease and wait so soon perhaps as it ought to have done; but that was not the cause of the accident, but that the *Margaret*, knowing where the *Clan Sinclair* was, attempted to pass between it and the *Zephyr* where there was not sufficient room.

Then Mr. Webster endeavoured to argue this, and he laid down a very sound general rule—he said that where there are regulations to be observed in the management of vessels at sea. the one vessel has always a right to suppose that the other vessel is going to do what would be right and proper, and regulate its own manœuvres on the supposition that the other vessel will do its duty and do all that ought to be done. That is very true, and where it applies I think it is a very sound rule to go by. But in this case the *Margaret* had not the slightest ground for believing that the *Clan Sinclair* would stop, or rather had stopped, three or four hundred yards farther up the river. The *Margaret* saw perfectly well where the *Clan Sinclair* was. The *Margaret* had a right to suppose that the *Clan Sinclair* would ease and stop as soon as it saw a vessel coming with the tide; and in fact the *Clan Sinclair* the moment it saw the *Margaret* did ease and

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stop even to the extent of backing; so that there seems to be some ground for saying that that vessel's head did go a little to the north. But that was not sufficient to occasion the *Margaret* to run between the *Clan Sinclair* and the *Zephyr* as it did when the space was too narrow for the vessel to go through. As far as I can perceive, it would have been perfectly safe and perfectly unobjectionable for the *Margaret* to have run down keeping nearer the south shore and keeping the *Clan Sinclair* on its starboard side.

That being so, it does not seem to me in point of fact to have been made out at all that the neglect of duty in not obeying rule 23 (assuming, as I do, without deciding it, that the conclusion to which the Court of Appeal came that there had been a neglect of duty was right) was a part of the fault which occasioned the accident; and that being so it is a case in which the *Margaret* and the *Margaret* alone being to blame, the *Margaret* and the *Margaret* alone must pay the damage. The consequence is that, taking that view, I move your Lordships to reverse the decision of the Court of Appeal, and to restore the decision of the Court of Admiralty.

LORD WATSON:—

My Lords, I concur in the judgment which has been moved by my noble and learned friend: and after the observations which he has made upon the evidence it is not necessary for me to say much in addition. I think it is matter of regret that these sailing rules for the direction of persons navigating the River Thames should have been expressed in language so ambiguous; I refer, of course, only to the rule No. 23, which is before the House in the present case, and to the heading of the section in which the rule occurs. I agree with my noble and learned friend that one part of rule 23 is express, namely, that part which applies to both sides of Blackwall Point, both to vessels coming down the river against the tide and to vessels going up the river against the tide. I do not think that when the terms of a rule are sufficiently explicit, they can be controlled or overborne by a mere heading, such as we have to deal with here. No doubt the heading is a part of the rules, and as part of the rules a part also of the statutory enactment; still, although it may be called in aid when enactments are ambiguous, I do not think that it can in any case be regarded as intended to override the plain terms of a rule like this.

The more ambiguous portions of the rule are those which refer to rounding the points, in this case rounding the Blackwall Point. These have given rise to a good deal of discussion, and I can only say that it is, in my opinion, unfortunate that mariners have for their guide doubtful words to which learned authorities have attached widely different meanings. I do not think that any of the definitions which have been given are very satisfactory. They come very much to this, that rounding the Point is rounding the Point; but what the Point is, and at what particular part of the river the rounding is to commence, and where it is to end, these definitions leave almost as much in the dark as the rule itself.

The other expression occurring in rule 23 which gives rise to some difficulty is the expression "ease and wait." That obviously does not mean that the vessel shall stop; it means that she shall proceed at a slower pace than ordinary, with, however, a particular object, that of remaining, I think, upon one side of the apex of the Point until the vessel approaching with the tide either shall have reached the point or shall have passed her—it is immaterial to decide which for the purposes of this case.

Now in the Courts below different views were taken as to the import of the rule, and what constitutes strict compliance with it. In both Courts it was held by the men of skill who advised the judges, that the *Clan Sinclair* might have gone slower than she did without losing the control of the vessel, that is to say, keeping her steerage way; but whilst the judge of the Admiralty Court was of opinion that her excess of speed over the quantum necessary to keep her going was not such as to constitute any departure from the rule, the learned judges of the Court of Appeal took a different view, and held that it was. Had I to decide that question at this moment, my inclination would be to concur with the learned judge of the Admiralty Court; but I do not think it necessary for the purposes of the case to decide that point, and for this reason, this rule has no statutory sanction attached to it; it has no provision analogous to that in the Merchant Shipping Act of 1873 which declares a mere departure from the statutory rules to constitute fault—fault from which the offending vessel can only excuse herself by shewing that "the circumstances of the case made departure from the regulation necessary." But in the case of a rule like this mere disobedience is not enough; it must be shewn that it constituted fault in this sense, that it was actively contributing to the collision. To express it otherwise, it must be shewn to have been one of the proximate causes of the collision.

Some observations, which appear to me to have an important bearing upon the facts of the present case, were made by the Lord Chancellor in *Spaight* v. *Tedcastle* (1). His Lordship there said, "When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiff cannot be established merely by shewing that if those in charge of the ship had in some earlier stage of navigation taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted in which the same danger might not have occurred." I read these words to explain the pith of the sentence which follows, and which is in these terms: "Such an omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the defendant's fault, and if it had no proper connection as a cause with the damage which followed as its effect."

Now I assume in favour of the respondents that the *Clan Sinclair* violated rule No. 23. In my opinion, that rule must be regarded as prescribing to shipmasters and others navigating the Thames certain reasonable precautions to be taken by all who have occasion to be in that part of the river near Blackwall Point; and I think that a vessel which is proved to have disregarded these precautions must accept the onus of shewing that the neglect of them did not contribute to any collision or damage which may have occurred at the time or subsequently. But then I am of opinion that in the present case the *Clan Sinclair* has discharged herself of that onus. I think it is made out by the evidence that nothing was either done or left undone by those who were navigating her which can reasonably be regarded as one of the causes of the collision. The result was to bring the vessel a good deal further down the Thames than she ought to have been; and if that conduct on the part of the *Clan Sinclair* had been such as to place the *Margaret* at this disadvantage, to throw her into difficulties and make it doubtful what course she ought to pursue, then I could hardly have excused the *Clan Sinclair* from contribution to the collision in the present case. But the fact was not so. The new and wrong position into which I assume the *Clan Sinclair* had been brought by her neglect of the rule, was perfectly apparent to those on board the *Margaret*, apparent for a considerable time and a considerable distance —for a time and distance of such appreciable extent that they could with ordinary care have avoided the collision which ensued; and the ground of my judgment is shortly this, that assuming that there was a breach of the rule and culpable neglect at the time, yet the consequences of that neglect could have been avoided by ordinary care on the part of the *Margaret*. Instead of exhibiting ordinary care and prudence those in charge of that vessel adopted a reckless course of navigation which is described so well in the opinions of some of the judges of the Court below that I need say nothing further about it.

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(1) 6 App. Cas. 217, 219.

On these grounds I concur in the judgment proposed.

LORD FITZGERALD:—

My Lords, I also concur, and I assume, for the purposes of the case, that upon the true interpretation of rule No. 23 the *Clan Sinclair* had begun to round Blackwall Point at the time when Captain Rule saw the masts of the *Margaret* over the headland. The words of the rule are "before rounding," and I assume that she had begun to round at that time; and then what she was to do was to "ease her engines." I do not mean to say that the obligation to ease depended at all upon her seeing the other vessel. As a rule of sound navigation three things are imposed upon a vessel navigating against the tide. First, when she comes to either of these headlands she must ease. No interpretation

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has been given to the word "ease" either in argument or in evidence; but it is known to any one who goes on steam vessels that a usual precaution of a steam vessel, in order to keep her completely handy and under command, is to ease her. She is then bound, when approaching any of these headlands, to ease in the first instance. I assume that there are some of those headlands where you cannot see across, and where you may be met by a vessel passing the point immediately. But when a vessel navigating against the tide is aware that a vessel is rounding the point with the tide, coming in the opposite direction, she is to wait until that vessel has passed her. I assume that to be the true construction of the rule, and that the obligation upon the *Clan Sinclair* was to ease, and that when the pilot became aware, or the captain became aware, that the *Margaret* was coming in the opposite direction with the tide, he ought to have waited in that eased condition and completely under command; and if it was for one to form an opinion as to whether there had been a substantial compliance by the *Clan Sinclair* with the requirements of this rule, I confess that I should be inclined to adopt the view of the judge of the Admiralty Court, and not to adopt the too rigid rule laid down by the Court of Appeal. But that is not necessary upon the present occasion, for upon the main question, assuming rule 23 to apply exactly, and that there was not a sufficient compliance with it by the *Clan Sinclair* in this respect, that her speed might have been less than it actually was, yet that leaves untouched the main question in the cause, which is one of fact,—Did the breach of the rule by the *Clan Sinclair* contribute to the collision? It is said that if she had rigidly complied with the rule, if her speed had been more reduced, she would not have been abreast of the *Zephyr*, and that if she had not been abreast of the *Zephyr* the calamity would not have arisen. In one respect that may be quite correct, but it is no answer to the inquiry upon which we are at present. She was seen by the *Margaret* a considerable time beforehand under steam. It was seen by the *Margaret* that she was alongside and abreast of the *Zephyr*. The *Margaret* was then a sufficient distance off, and was completely under control. She had two courses open to her free from danger—one to pass to the north of the schooner,

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and the second to pass to the south of the *Clan Sinclair*. She did not do either, but for some reason (and possibly, if I were at liberty to speculate, it was the reason which it is found in these collision cases is too often the cause of the calamity, namely, taking the short cut in place of adopting a more safe course) she adopted another and a dangerous and reckless course, namely, that of passing between the *Clan Sinclair* and the *Zephyr*, and under such circumstances as to make it extremely probable that she would come into collision with one or the other. She came into collision with the *Clan Sinclair*. The latter had immediately before and when it became apparent that there was danger, used all the precautions in her power to avoid it, but her efforts were ineffectual.

I conceive it to be clear, upon a true view of the case, that the *Clan Sinclair* did not cause the calamity either wholly or in part, and that therefore the decision of the Court of Admiralty was correct.

Order appealed against reversed; judgment of the Admiralty Division restored. The respondents to pay the costs in the Court below and in this House. Cause remitted to the Admiralty Division.

Lords' Journals 1st August 1884.

Solicitors for appellants: *Hollams, Son, & Coward.*
Solicitors for respondents: *Freshfields & Williams.*

[HOUSE OF LORDS.]

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EDWARD BOWEN AND JOHN KEYS THOMAS . . . . APPELLANTS;

AND

THOMAS LEWIS . . . . RESPONDENT.

Will—Devise—Construction—"Estate"—"Child or Children"—"Dying without Issue"—Rule in Shelley's Case (1 *Rep.* 93 *b*).

By a will made in 1820 the testatrix said "I give and devise unto my eldest son Thomas all my real and freehold estate and all leases and leasehold premises now in my possession (subject to the payment of the rents and the performance of the covenants mentioned in the said indentures of leases) during the term of his natural life, and after his decease to his legitimate child or children (if there be any); but if he dies without issue my will is it may go unto my other son William during the term of his natural life, and afterwards to his legitimate child or children (if any); but if he should likewise die without issue my will is it may go to my daughter Mary and to her heirs and assigns for ever."

The will then gave legacies to the second son and the daughters, with provisions for the daughters, to be paid in the first instance by Thomas, but to be repaid in part or in whole to him in certain events by his successor in the estate. Thomas died without issue.

Held, by EARL CAIRNS and LORDS BLACKBURN and FITZGERALD, affirming the decision of the Court of Appeal, that reading the whole will together Thomas took an estate tail in the realty.

Contrà, by the EARL OF SELBORNE L.C. and LORD BRAMWELL, that Thomas took an estate for life, with remainder to his children (if any) in fee as purchasers.

APPEAL from an order of the Court of Appeal.

The action was brought by the respondent against the appellants to recover possession of a house and farm of about six acres at Carvarchell, Pembrokeshire, and mesne profits. At the trial at Haverfordwest Assizes in July 1882 before Manisty J. without a jury the following facts were proved:—

Mary Thomas of Carvarchell being seised in fee of the house and farm made her last will on the 2nd March 1820, the material parts of which were as follows:—

"I give and devise unto my eldest son Thomas Thomas all my real and freehold estate and all leases and leasehold premises now in my possession (subject to the payment of the rents and the performance of the covenants mentioned in the said indentures of leases) during the term of his natural life, and after his decease to his legitimate child or children (if there be any); but if he dies without issue my will is it may go unto my other son William Thomas during the term of his natural life, and afterwards to his legitimate child or children (if any), but if he should likewise die without issue my will is it may go to my daughter Mary Bevan and to her heirs and assigns for ever. But this bequest and devise is nevertheless subject to the following payments and restrictions, that is to say:—If my son Thomas shall live in the possession and enjoyment of the said real estate for fourteen years the whole of the sums hereinafter by me bequeathed shall be paid by him alone, and his heirs or assigns shall have no claim upon his successor for repayment of any part of the same; but should he die in less than fourteen years after coming into possession of the said estate and leaving no issue, my will is that he shall pay only a part of the said sum, that is, according to ten pounds for every year he shall be in possession, and the person succeeding him in the possession of the said estate shall before he shall have possession repay unto the heirs executors or assigns of my said son Thomas Thomas, whatever shall have been paid by him of the said sums hereinafter to be bequeathed above ten pounds for every year he shall have been in possession, and should his successor die without legitimate issue before the expiration of the remainder of the fourteen years, his heirs executors or assigns shall have the like claim on his successor as in the former case. I give and bequeath unto my daughter Elizabeth Loyn the sum of two shillings and sixpence. I give and bequeath unto my said son William the sum of twenty pounds. I give and bequeath unto each of my daughters following, viz.:—Mary, Phebe, Amy, Anne, and Margaret the like sum of twenty pounds each, the whole of the said legacies to be paid by my executor, hereinafter named, within twelve calendar months after my decease. I also give and bequeath unto each of my daughters as shall continue unmarried at the time of my death the whole of the stock and crop, implements of husbandry and household furniture, to be divided among them, share and share alike. And, moreover, my will is that my last mentioned daughters shall be maintained and provided for in neat, lodgings, and washing for five years after my decease if they remain so long unmarried (if one or any of them should marry before the expiration of the said five years, she or they shall be provided for until their marriage only), by the person in whose possession the real estate before mentioned and devised shall be, or if they or either of them shall prefer it, to be paid three pounds each (and support themselves elsewhere), that is, three pounds each annually for the term and according to the rule above mentioned by the said mentioned person. The residue and remainder of my property of what nature and kind soever the same may be (after paying my just debts, funeral expenses, and the expenses of proving this will) I give and bequeath unto my said son Thomas Thomas, and I nominate, constitute, and appoint him the sole executor of this my last will and testament, hereby revoking all other will or wills by me before made. In witness," &c.

The testatrix died on the 29th of June 1820 leaving her surviving two sons, viz., her eldest, Thomas Clement Thomas, (hereinafter called Thomas) and William Thomas (hereinafter called William). Thomas entered into possession of the house and farm on the death of his mother, and on the 3rd of January 1854 duly executed and enrolled a disentailing deed, under which the house and farm ultimately in 1879 vested in the respondent. Thomas demised the property to the appellant Bowen, and died in 1862 without issue; and on his death his widow received the rents from Bowen until her death in 1878. William died in 1874 leaving a son, the appellant John Keys Thomas, who in 1879 demised the property to the appellant Bowen.

Manisty J. held that Thomas took an estate tail, and directed judgment for the plaintiff, the present respondent, for possession and £56 for mesne profits for four years.

The Court of Appeal (Brett M.R. Cotton and Bowen L.JJ.) affirmed this decision on the 24th of April 1883.

The appeal was twice argued; first on the 20th, 23rd and 24th

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of June before the Earl of Selborne L.C. and Lords Blackburn and FitzGerald, and secondly on the 28th of July before the Earl of Selborne L.C., Earl Cairns, and Lords Blackburn, Bramwell, and FitzGerald.

J. T. Crossley Q.C. (*B. Francis Williams* and *Le Breton* with him) for the appellants:—

The devise includes leaseholds, but it is understood that they have all run out and the question is as to the freehold house and farm. The intention of the testatrix was to provide for all her children: Thomas first and his children (if any): if he had no children, then for William and his children; Thomas took (in this view) an estate for life only with remainder to his eldest and other children in fee; if more than one, as joint tenants. The word "estate" imports a fee: and carries the inheritance, not only the corpus but all the interest of the testator: 2 Jarman on Wills (4th ed.) 275; *Montgomery* v. *Montgomery* (1), per Sugden L.C.; and see *Clifford* v. *Koe* (2). Under such a will as this the parent does not take an estate tail, but the fee vests in the children: *Roddy* v. *FitzGerald* (3), per Crompton J.; *Bradley* v. *Cartwright* (4); *Robinson* v. *Robinson* (5). "It is clear that where the word 'estate' occurs elsewhere in the same will in company with express words of limitation in fee, its operation to confer the inheritance is not thereby restrained": 2 Jarman on Wills, 278; *Uthwatt* v. *Bryant* (6); *Ibbetson* v. *Beckwith* (7); *Coltsmann* v. *Coltsmann* (8), per Earl Cairns (where "property" was held to pass the fee); and *Maden* v. *Taylor* (9).

The words "if he dies without issue" are not "without leaving issue," and mean "if he dies without having had issue." Coming after the words 'child or children' they have a referential construction only, 2 Jarman on Wills, 458 (4th ed.), and mean "if he dies without children." "It is well settled that words importing a failure of issue (without the word *such*), following a devise to

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(1) 3 J. & Lat. 47, 59.
(2) 5 App. Cas. 447.
(3) 6 H. L. C. 823, 855.
(4) Law Rep. 2 C. P. 511, 521.
(5) 1 Burr. 38.
(6) 6 Taunt. 317.
(7) Cas. temp. Talb. 157.
(8) Law Rep. 3 H. L. 121.
(9) 45 L. J. (Ch.) 569.

children in fee simple or fee tail, refer to the objects of that prior devise and not to issue at large": 2 Jarman on Wills, 459 (4th ed.); *Ginger* v. *White* (1), where Willes C.J. held that "issue" meant such issue as the testator had mentioned before; and *Goodright* v. *Dunham* (2).

[EARL CAIRNS referred to *Robinson* v. *Hicks* (3). His Lordship also drew attention to the clause in the present will, "should his" (Thomas's) "successor die without legitimate issue," which might seem to imply that Thomas's children would not take in fee.]

That clause is so worded that it would not come into operation if Thomas died without children, and the words "his successor" apply to William or William's children. As to the rules for observing a testator's intention see *Sweeting* v. *Prideaux* (4); *Towns* v. *Wentworth* (5).

Bowen Rowlands Q.C. (*Abel Thomas* with him) for the respondent:—

Thomas took an estate tail by virtue of the words "if he dies without issue." The word "estate" may carry the fee, but it depends on the intention of the testator and on the context: *Key* v. *Key* (6); *Doe* d. *Bosnall* v. *Harvey* (7), per Holroyd J.; 2 Jarman on Wills (4th ed.) 476, citing *Martin* v. *McCausland* (8); *Morgan* v. *Thomas* (9); *Dalzell* v. *Welsh* (10) cited in 2 Jarman on Wills, 4th ed., 439, n.; *Jesson* v. *Wright* (11); *Rex* v. *Marquis of Stafford* (12); *Bradley* v. *Cartwright* (13); *Lewis* v. *Waters* (14). "Child or children" in the present will means "descendants;" the intention of the testatrix being that there should be an indefinite failure of one son's issue before the next took. The word "estate" is satisfied by the gift in fee to her daughter.

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(1) Willes, 348.

(2) 1 Doug. 264.

(3) 3 Bro. Par. Cas. 180, 185, tit. "Devise," 2nd Ed. by Tomlins.

(4) 2 Ch. D. 416.

(5) 11 Moo. P. C. 526.

(6) 4 D. M. & G. 73, 81.

(7) 4 B. & C. 610, 623.

(8) 4 Ir. L. R. 340.

(9) 8 Q. B. D. 575; 9 Q. B. D. 643.

(10) 2 Sim. 319.

(11) 2 Bli. 1.

(12) 7 East, 521.

(13) Law Rep. 2 C. P. 511.

(14) 6 East, 336.

Crossley Q.C. replied and referred to *Wilkinson* v. *Chapman* (1), and *Baker* v. *Tucker* (2).

The House took time for consideration.

Aug. 4. EARL OF SELBORNE L.C.:—

My Lords, this case has been twice argued, and there remains, after the second argument, a difference of opinion among your Lordships. I have the misfortune to have formed an opinion in which the majority of your Lordships do not concur, but nevertheless it is my duty to state it.

The Court of Appeal, when deciding for an estate tail in this case, appears to have been much influenced by the consideration that the testatrix Mary Thomas was a person unacquainted with the technical signification of legal terms, and to have thought it safe to rely upon a general purpose, supposed to be discoverable from the will, without endeavouring to apply the ordinary rules of construction to its particular words and dispositions. With unfeigned respect for the very learned judges who so decided the case, I feel myself obliged to follow an opposite process; first, because I should not be led to the same conclusion with the Court of Appeal, if, without regard to the technical rule established in *Shelley's Case* (3), I considered only what the testatrix, as an unlearned person, was likely to have meant by the words which she used; and, secondly, because I cannot discover, from the language of this will, any general intention to keep her property in her family, in a way which could only be effectuated by vesting estates tail in her sons Thomas and William, apart from the operation of those purely technical rules of construction of which the testatrix, as an unlearned person, may be presumed to have been ignorant, though a Court of construction may nevertheless be bound to act upon them, so far as they apply.

Construed naturally, and apart from technical rules, I should say, that, when the testatrix gave her real estate to her son Thomas (and afterwards, in a certain event, to her son William), "during the term of his natural life," she meant him to take it for life, and no longer; and that, when she gave it, "after his decease to his legitimate child or children if any" (without restricting them to life estates), she meant those children (if there were any) to take all that she had to give, or, in other words, to take the fee. This will, having been made in 1820, is not subject to the Act of 1837. But, with reference to the change made by sect. 28 of the Act of 1837, Mr. Jarman rightly observes, that "perhaps there was no one of the old rules of testamentary construction which so directly clashed with popular views as that which required words of limitation, or some equivalent expression, to pass the inheritance; and hence the attention of the framer of the recent Act of 1 Vict. c. 26 was naturally directed to the abolition of this technical doctrine." Unless that technical doctrine applies here, so as necessarily or properly to govern the construction of this will, I cannot presume the intention of this testatrix to have been in accordance with it, because she was unlearned; nor can I find in the sequel of the will sufficient evidence of any general intention, to which the particular intention expressed in the dispositions in favour of Thomas and his children (whatever may be their proper construction) ought to give way.

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(1) 3 Russ. 145.

(2) 3 H. L. C. 106.

(3) 1 Rep. 93 b.

If those dispositions had stood alone, without the contingent gifts over which follow them, it is, in my opinion, clear, that they would have given the eldest son of the testatrix, Thomas, an estate for life only, with remainder in fee simple to his children, if more than one, as joint tenants (or, if only one child, to that child) immediately on their, his, or her coming into existence: *Randall* v. *Tuchin* (1); *Ibbetson* v. *Beckwith* (2). The words "all my real and freehold estate" in such a context, would, beyond question, have supplied the want of an express limitation to the children's heirs. "Estate" here is a word free from ambiguity. It cannot (as in some cases) describe a particular subject, as distinguished from the entirety of the right and interest of the testatrix in that subject. She had the fee simple, and that is what she gives. And it is not immaterial to observe that the construction which makes a gift of "all my estate" to A. B. equivalent to a gift to A. B. and his heirs is not technical, but is

(1) 6 Taunt. 410.

(2) Cas. t. Talb. 157.

one of good sense, displacing technicality. It is one which ought not itself to be displaced without some context repugnant to it. In the words of Chief Justice Gibbs (1), "It shall carry a fee unless restrained by other parts of the will. It may be that the signification of the word 'estate' may be restrained; but it lies on the party who seeks to narrow its construction to shew by what expressions in the will it is restrained."

It is, however, necessary to construe these dispositions, not as if they stood alone, but with due regard to all the rest of the will. The testatrix proceeds to say: "But if he" (that is, Thomas) "dies without issue, my will is, it may go unto my other son, William Thomas, during the term of his natural life, and afterwards to his legitimate child or children, if any; but if he should likewise die without issue, my will is, it may go to my daughter, Mary Bevan, and to her heirs and assigns for ever." Upon these words, there arise three questions: 1st, what is meant by "his legitimate child or children, if any"? 2ndly, what is meant by dying "without issue"? and 3rdly, whether the express limitation to the "heirs and assigns" of the daughter, in the event in which she is to take, ought to have any, and what, influence upon the construction of the antecedent words?

1. The primary sense of the word "children" is issue of the first generation, and that primary sense ought to be adhered to, when there is nothing, or not enough, to displace it. There are, no doubt, cases in which it is equivalent to issue in the widest sense, as in *Wild's Case* (2), when a parent and his unborn children would otherwise take concurrently; or under such a form of gift as that in *Lord Tyrone* v. *Lord Waterford* (3), "to my brother J. B. and to his children in succession," where no definite estate was limited either to the parent or to any child, and where "succession" (the only thing expressed) might be best accomplished through an estate tail in the father, under which every child in turn might take the inheritance. But there is no resemblance between such cases and one in which an estate is expressly given to the father "during the term of his natural life," and "after his decease to his legitimate child or

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(1) 6 Taunt. 416.

(2) 6 Rep. 17.

(3) 1 D. F. & J. 613.

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children, if there be any;" nor can I derive any assistance for the determination of the present question from such a case as *Robinson* v. *Robinson* (1), in which the singular word "son," in the particular context in which it stood, was held to be nomen collectivum.

Unless, in this case, the subsequent context is enough to prevent the application of ordinary principles of construction, the children must take as purchasers, in remainder after their father's life estate, whether they take for life only or in fee. I am myself unable to find anything in the subsequent context which ought to prevent them from so taking. On either supposition, the words which introduce the gift over, "but if he" (i.e., the father) "dies without issue," will receive full effect, without altering or enlarging the proper sense of the word "children." If they take for life only, an estate tail will be implied in the father, not immediate (so as to exclude them), but in remainder after their life estates, or in the contingency of there being no child. If they take the fee, then (I think) the referential construction of the word "issue" ought to prevail, and the gift over will take effect if there is no child. There is not, in either view, any occasion for imposing a sense on the words "child or children" which would make them words of limitation, and so defeat the manifest intention to give something directly to the children, after their father's life estate. The rule in *Shelley's Case* (2) ought not, in my opinion, to be extended, so as to defeat unnecessarily the expressed intention, by straining the interpretation of such words as "child or children," when they are capable of being understood in their usual and primary sense.

If the children take as purchasers, I am unable to see why they should not take the fee, under any words sufficient in themselves to give it, merely because there is a gift over, if the father "dies without issue." There is no limitation here of fee upon fee, it is an alternative limitation to take effect if the prior limitation to the children fails. That this would be so, if the limitation were to the children "and their heirs," is not disputed; and to me it seems that the effect would have been the same if the words had

(1) 1 Burr. 40.

(2) 1 Rep. 93 b.

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been "and after his decease, I give *my said estate* to his legitimate child or children, if any." No doubt the word "estate" does not occur in that exact place, but it does occur in a way which (as in *Ibbetson* v. *Beckwith* (1), and *Randall* v. *Tuchin* (2)), is really equivalent to it, unless there be something in the context repugnant to that construction.

I am not moved by the consideration that the testatrix may not have been likely to intend the fee to vest absolutely in children who might afterwards die without issue in the lifetime of their father. This supposed improbability would have had no weight as against the legal effect of a gift to the children and their heirs; and it ought not, I think, to alter the construction of other words which otherwise would be equivalent to such a gift. For this purpose it cannot, in my opinion, make any difference whether there is a gift to "issue" with words of distribution (but without mention of heirs), therefore construed "children," (as in *Montgomery* v. *Montgomery* (3)), or a gift to children expressly, as here. In either case, if there were any child to take, the gifts over would fail to take effect, although such child might die in minority without issue. It is not safe to assume that testators, especially those who are unlearned, speculate upon, or provide against, possible consequences of their dispositions, in all the contingencies which may happen to the objects of their bounty.

2. Thinking, as I do, that the context of this will, so far, is not repugnant to the vesting of a fee in the children (if any), and that the word "estate," as it here occurs, is sufficient for that purpose, the interpretation of the words "dying without issue" presents, to my mind, no difficulty.

A devise over, in the event of the death "without issue" of a tenant for life, all whose children take in remainder after him in fee, does not, generally, (according to authorities well founded in principle, and which have been regarded for more than a century as law,) either enlarge the primâ facie sense of the word "children," so as to make it include issue beyond the first generation, or give an estate tail by implication to the tenant for

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(1) Cas. t. Talb. 157.
(2) 6 Taunt. 410.
(3) 3 J. & Lat. 47.

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life under the rule in *Shelley's Case* (1). "It is well settled," says Mr. Jarman (vol. ii., 3rd ed., p. 434), "that words importing a failure of issue (without the word 'such'), following a devise to children in fee simple or fee tail, refer to the objects of that prior devise, and not to issue at large," quoting *Ginger* v. *White* (decided in 1742) (2), *Goodright* v. *Dunham* (1779) (3), and *Malcolm* v. *Taylor* (1831) (4), to which may be added the observations of Lord Kingsdown in *Towns* v. *Wentworth* (5). This construction is in accordance with good sense, especially when the gift over is (as here) introduced by the word "but"; and it is in no way opposed to the very different class of authorities, (referred to, and distinguished by Mr. Jarman at pp. 444, 445 of the same volume,) in which "similar words, preceded by a devise to one or more son or sons only, have been decided not to be simply referential, but to import a general failure of issue, and therefore, in the case of real estate, to confer an estate tail on the parent;" to which class the case of *Key* v. *Key* (6), relied upon by the respondent's counsel, belongs.

It cannot, I think, make any difference, for this purpose, whether the children take estates of inheritance by virtue of such words as "estate" or "property," or by an express limitation to heirs. In *Montgomery* v. *Montgomery* (7) the gift was, of "all that and those my part of the towns and lands of A., being lately part of the estate of J. K., purchased by me under a decree of the Court of Chancery," to the testator's son, William Montgomery, "during his natural life and no longer, unless it shall so happen that my said son shall survive his present wife, and marry a second or other wife, by whom he shall have lawful issue living at the time of his death; and then and in that case" (so the will, made in 1791, continued) "I leave, devise, and bequeath my said part of said towns and lands of A., upon the death of my said son, leaving issue male of such second or other marriage, to such issue male, share and share alike; and for want of issue male to the issue female of such second or other marriage, share and share

(1) 1 Rep. 93 b.
(2) Willes, 348.
(3) 1 Doug. 264.
(4) 2 R. & My. 416.
(5) 11 Moo. P. C. 546, 547.
(6) 4 D. M. & G. 73.
(7) 3 J. & Lat. 47.

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alike; and in case it shall so happen that my said son shall die without leaving any such issue of a second or other marriage, then and in that case I leave, devise, and bequeath said towns and lands of A. to my two grandsons James and John Armstrong, *and their heirs*, and the survivor of them, share and share alike, to hold to their own use and benefit for ever; and in case the said James and John Armstrong shall happen to die without leaving lawful issue, then I leave, devise, and bequeath the said last mentioned towns and lands to my grandson, M. M. Armstrong *and his heirs;* and in case of his death without lawful issue I leave, &c., the said last mentioned towns, lands, and premises to my said two grandsons R. and W. Armstrong, *and their heirs*, share and share alike *for ever*." In the gifts to the issue of William Montgomery there was no limitation to heirs; but Lord St. Leonards held the words descriptive of the subject of gift (see page 61) to be sufficient to designate all the estate which the testator had purchased at the auction referred to, and, therefore, to pass the fee to the children of William Montgomery; although in the contingent gifts over, which followed, there were express words of limitation to heirs. His Lordship thought it clear "that the testator intended his son to take for life only, and the sons or daughters of the son, by any subsequent marriage, to take the fee as purchasers, as tenants in common; and the grandsons, the remainder-men, only to take upon the contingency of the first devise not taking effect." Upon the question whether the children of Thomas, the eldest son of the present testatrix, would take estates in fee, this case appears to me to be a direct authority, indeed, I should say an authority *à fortiori*, for the present appellants; and, although the word "such" occurred there in the gift over (in a manner in which it does not occur in the present case), I cannot doubt that, if it had been absent, the conclusion of Lord St. Leonards would have been the same. Lord Wensleydale, in *Roddy* v. *Fitzgerald* (1), quoted in terms of approval the proposition of Mr. Jarman (3rd ed., vol. ii., p. 417), deduced from this and other cases, that "where words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, the ancestor takes an estate for life only, and the result is the same, whether the fee is given by

(1) 6 H. L. C. 883.

the technical words 'heirs and assigns,' or by such words as 'estate,' 'part,' 'share,' &c., occurring in the description of the subject of gift, or words imposing a pecuniary charge upon the issue . . . . and whether there is a gift over on general failure of the issue of the ancestor, or not." The presence or absence of words of distribution is material, when the question is, whether "issue" (or the like) is itself a word of limitation, or is descriptive of persons who are to take as purchasers; but I do not think it material, when the gift is to "children," and when there is no other reason for holding "children" to be a word of limitation. I cannot think that the mere absence of words of distribution is a sufficient ground for excluding the referential construction of the word "issue." The gift embraces *all* possible children, and there is no more reason why they should not take the fee in joint tenancy, by virtue of the word "estate," than why they should not have taken it as tenants in common, if the gift had contained words of distribution. There is no more ground for rejecting the referential construction of the word "issue," because of the possibility that a child might die leaving issue without having severed the joint tenancy, than there was in *Towns* v. *Wentworth*, by reason of the possibility that a child might die leaving issue in the testator's lifetime (as to which see Lord Kingsdown's observations (1)). Why should this testatrix be supposed to have been thinking of the legal incidents and consequences of a joint tenancy, but not of the legal incidents and consequences of an estate tail?

3. I am unable to find in the rest of the present will (unless it be in the provisions as to the repayment of legacies paid by the devisees of the real estate) anything which either on principle or authority, ought to alter or affect the construction of the gift to the children. The limitations to William for life, and afterwards to his legitimate child or children, if any, correspond exactly with those in favour of Thomas and his children, and they would take effect (according to the referential construction of "issue") if Thomas had no child to take, and in that event only. The gift over to the daughter is introduced by like words; and if the referential construction is right in the places where they previously

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(1) 11 Moo. P. C. 546–549.

occur, it is right there also. *Montgomery* v. *Montgomery* (1) appears to me (as I have already said) to be a direct authority against the suggestion that, because the ultimate contingent gift is to the daughter, "and to her heirs and assigns for ever," therefore the word "estate," in the description of the subject-matter of the gift, ought not to be held to pass the fee under the prior alternative gifts to the children of Thomas and William. *Ibbetson* v. *Beckwith* (2) is also an authority to the same effect. The proposition of Mr. Jarman (vol. ii., 3rd ed., p. 257) that "where the word estate occurs elsewhere in the same will, in company with express words of limitation in fee, its operation to confer the inheritance is not thereby restrained," is supported by authority; and I cannot conceive why it should be so restrained when that word occurs once only, at the commencement of a series of gifts, of which the latter are contingent upon events which may or may not happen, and are substituted (in those events only) for the earlier; the last only of those contingent gifts being made with express words of limitation in fee. The case of *Doe* v. *Harvey* (3) was very different, and appears to me to have no bearing upon the present question.

I was struck, upon the second argument of this case, by the fact (not much insisted upon by the learned counsel on either side), that in the directions which she has given for the repayment in certain events of legacies made payable by the devisees of the real estate, the testatrix has provided for the death of her son Thomas within fourteen years after coming into possession, "and leaving no issue" (in which case "the person succeeding him in the possession of the said estate" was to make the repayment), and for the death of "his successor," "without legitimate issue," before the expiration of the remainder of the fourteen years (in which case his representatives were to "have the like claim upon his successor as in the former case"). These directions certainly shew that the testatrix did not intend the amount of the legacies to be repaid to a father, whose issue might take the estate after him, and they appear to me to be more favourable than anything else in the will to that construction, which would give the father an estate tail. But, after considering them, I am not satisfied that

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(1) 3 J. & Lat. 47.

(2) Cas. t. Talb. 157.

(3) 4 B. & C. 610.

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they are not consistent with the opposite case of the children taking the fee by purchase, in remainder, after their father's life estate. I think the persons here contemplated as entitled to receive repayment are only Thomas and William, both expressly made tenants for life by the will; and the reason for making such repayment of a capital charge to a tenant for life, who dies within a short time of coming into possession, is obvious, and would be less applicable to a tenant in tail. If there were issue to take after Thomas, or after William, whether by purchase or by inheritance, William (in the one case) and Mary (in the other) would not "succeed to the possession of the estate," and therefore could not be charged with the obligation of making repayment to the representatives of the preceding owner. These directions, therefore, are in their substance consistent and appropriate, if the children take the fee, and I do not think that the use in them either of the word "issue" or of the word "leaving" is sufficient to determine the construction of the antecedent words of gift.

I am of opinion that the decisions of the Courts below are erroneous, and ought to be reversed, but as I believe that a majority of your Lordships think differently, the judgment of the House will be according to their view.

EARL CAIRNS:—

My Lords, it is not by any means surprising that the minds of those who have to consider this very difficult and obscure will should differ as to the proper construction of it. I observe that it was said in the Court below that the testatrix appears to have been an illiterate person in humble life. I do not think that it is this circumstance which has created the difficulty. If the testatrix had used her own words, very possibly they might have been obscure and such as an illiterate person would have used, but at the same time your Lordships would have had the satisfaction of knowing that in putting a construction upon them you were putting a construction upon the words actually used by the testatrix herself. Now what your Lordships have to deal with here are words which are clearly not the words of the testatrix herself—they are the words of some person who appears to have considered himself a lawyer; and no doubt he was acquainted with the legal terms used in making a will, but at the same time he was not sufficiently master of his subject to be fully aware of the effect of the words that he was using. That appears to me to be what has created the difficulty. You have not got the words of the testatrix herself, and you have got words which there is great reason to suppose she did not understand, and which I cannot think that the person who used them understood himself in their full effect as legal terms of art.

Now there are some questions arising upon this will as to which I think there can be no doubt about the answer. It appears to me to be perfectly clear that the word "estate," before the new Wills Act, was a word sufficient to carry the fee if there was nothing at variance with that construction upon the whole of the will. It would not be a word of the vigour and force of a gift to a man and his heirs, but it would have the effect of carrying the fee, unless there was something in the context which led to a different conclusion. I take it to be also quite clear that that is so, even although in the same will, in another part of it, you find words of gift with words of inheritance superadded to the word "estate." I take it to be also quite clear that the word "child" or "children" is primâ facie a designation of a person or persons in the first degree of descent; but at the same time it may be used as a nomen collectivum: popularly it is so used. There are many cases in which we speak of the children of a family or the children of a person, meaning to denote not issue of the first generation but issue generally. I take it to be also clear, as clear as anything can be in law, that the words "dying without issue," before the new Wills Act, are words pointing to a general failure of issue and not a failure of issue at a particular time. I take it also to be clear upon the authorities that if you have a gift to children, with words of division or of inheritance, the children would take as purchasers; and then if you have a gift over in the event of death without issue, those words pointing to death without issue are to be construed referentially and to have their explanation from the gift to the particular individuals that you have had before.

Now upon those questions as matters of law I think there is no dispute, and I do not think there was really any dispute upon them in the argument of this case. The question is as to their application to the present case; and the crucial question which your Lordships have to solve is this :—Did the testatrix mean to give her estate to the children or child of Thomas in fee as purchasers? For the purpose of determining this question I hold it to be absolutely necessary that your Lordships should look at the whole of the will and not at any particular sentence or clause of a sentence in the will. I speak with the most perfect respect and deference to those who take a different view from that which I have been able to take; but it does appear to me that the process by which the opposite conclusion is arrived at is something very like the process of a circular argument. I might state it thus :—The word "estate" carries the fee simple, and therefore where you have the gift of an "estate" to "children" in this will, it must mean a gift to the children in fee-simple; because it is a gift to the children in fee simple, ergo the word "children" cannot be a nomen collectivum: because the gift to the children is not a gift to them as a nomen collectivum, ergo the gift over upon dying without issue must mean not generally dying without issue, but dying without the children who are mentioned before. Now I might illustrate the fallacy of this by a circular argument in the opposite direction. If I begin at the other end you will have quite as good a circular argument backwards. Here is a gift over on death without issue; that means on the failure of issue generally; therefore when you go back and find that preceded by a gift to "children," in order to make the two consistent, the word "children" there must be a nomen collectivum and must mean issue: and because you have a gift to children as a nomen collectivum, that is to issue, ergo they cannot take as purchasers in fee simple, but must take an estate tail. It seems to me that the circular argument is just as good in the one direction as in the other, if you proceed upon the principle of putting a construction upon one clause without looking at the will as a whole.

Before looking at the whole will with reference to the use of the word "children," as to whether it is a word of limitation or purchase, there is one observation which I should like to make. It is quite clear that you have no words of division or words of inheritance in the technical sense of the term. You have the word "children" standing alone. Then you have a gift over upon death without issue, which I say means primâ facie dying without issue generally; and then you have the word "estate," which I agree may carry, but does not of necessity carry, the fee simple.

Now let us look for a moment at the whole of this very short will. I observe that it has been said that the rule in *Shelley's Case* (1), as it is called, is a technical rule, and that in considering whether you must apply the rule in *Shelley's Case* (1) you ought to proceed as if you were dealing with a technical rule, and not to give way to technicality unless it be absolutely necessary. I am bound to say that in my opinion the rule in *Shelley's Case* (1) is not only not a technical rule, but it is the very opposite of a technical rule. It is a rule which has been established through a long course of decisions extending over a great many generations, and upon the ground, as I understand it, that it is desirable to avoid the effect of technicality. The foundation of the rule in *Shelley's Case* (1), as I understand it, is this: You have an indication of a general intention, which you gather from the whole of the will, that the estate shall travel through the issue generally of a certain person. You have that accompanied, no doubt, with a particular intention that the first taker shall take an estate for life; but in order to give effect not to a technical construction, which would limit the first taker to a life estate, but to give effect to the general intention of the testator, and to make the estate travel through the issue generally, as the testator intended it to do, you apply the rule in *Shelley's Case* (1). Otherwise, if you do not do that, the consequence is that the only other resource which you have is to give to the first taker in the series of issue an estate by purchase, in which case it will not go through the issue generally, but only through the descendants of that particular head of the issue. Therefore I repeat that the rule in *Shelley's Case* (1) appears to me not to be a technical rule but to be a rule of substance in order to give effect to the intention.

Now, the testatrix in this case was, as it is termed, an illiterate woman. No doubt she was in a humble position of life; and she had this little farm, which both sides state to be of the value of

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(1) 1 Rep. 93 b.

£14 a year. I gather from the pecuniary provisions which she makes in her will that her ideas altogether were of a most moderate kind. She had two sons, and she had at least six daughters, because six are mentioned in the will. With regard to the second son she makes a pecuniary provision for him to the amount of £20; and she makes a pecuniary provision for the five daughters so long as they remain unmarried up to five years after her death,—a provision which she puts at £3 each annually. That would be a maximum of £15 for each daughter, or £90 for the whole six daughters, and £20 for the younger son, making £110 altogether. Assuming this estate to be worth £14 a year, I take it that that was pretty nearly half the value of the whole estate. She provides, subject to certain details in the event of his dying inside fourteen years, in the first instance that the eldest son, Thomas, is to pay down all these sums, at least all that become payable, within a twelvemonth after her death—that is to say, the £20 would become payable then, and the others would be payable de anno in annum.

That being the state of her family, the testatrix devises the property to her "eldest son Thomas Thomas" "during the term of his natural life, and after his decease to his legitimate child or children (if there be any), but if he dies without issue my will is it may go unto my other son, William Thomas, during the term of his natural life, and afterwards to his legitimate child or children (if any), but if he should likewise die without issue my will is it may go to my daughter Mary Bevan and to her heirs and assigns for ever." Well, I own (speaking again with great respect to those who entertain a different opinion) that the words which I have read seem to me to point, as clearly as inartificial and inaccurate words can point, to this idea, this current of thought in the mind of the testatrix,—that her second son should have an immediate provision of £20, to be the representation of his benefit to be received from the property, supposing that it did not come to him by the devolution which she had created, but that otherwise this little farm was to go through the family of her two sons, the parents taking first, and their children, in the sense of the collective term "issue," their family, taking after them. On the failure of the one family it was to go to the

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family of the second son, and on the failure of the family of the second son it was to go to the first daughter and then to stop. The process with regard to the daughter was to be perfectly different from the process with regard to the sons. The testatrix had the idea of keeping the property in the family of the sons, and when it came to the first daughter stopping it there; shewing that either she or the person who made the will understood perfectly well how to use the words which would give to the first daughter an absolute interest in the property and put an end to any further devolution of it; but the property, until it came to the first daughter, was to devolve in a way analogous to what we call the devolution of settled estate. That seems to me to be the effect of the first part of the will; and stopping there, I must say that I can conceive of nothing which would appear to me to be more at variance with what I collect to have been the intention, than that if Thomas were to have a son who might die in his infancy, and to have no further family, this estate should be found to have vested in fee-simple in that infant, and upon his death in infancy to have gone over, as I suppose it would under the old law, to the second son of the testatrix (the very person who was to have a charge upon the estate) in place of going in a course of devolution through the second son's family. It appears to me that it would have given a perfect shock to the mind of this testatrix if she had been made aware that that would be the effect of the construction put upon the will by those who hold that the children of the first family took an absolute interest.

I have looked also through the second part of the will, the part which provides for what I may call the mode in which the charges are to be borne in the event of the death of Thomas and others within a particular limit of time. It is a very clumsy clause, and it is very difficult to put a consistent construction upon every part of it; but the clause being there, it does impress my mind in the strongest way that what was before the mind of the testatrix, or of whoever was making the will, was that the estate was travelling down a course of devolution like that of an estate tail. That, I think, is quite clear. The provisions are not such as would have been perfectly appropriate, but they are not consistent with any other idea. I might point your Lordships to the consequence which would happen upon any different construction. Suppose that Thomas had died in less than fourteen years after coming into possession of the estate, leaving a child surviving him who had afterwards died, the estate would then have gone over to the second son; the second son would have had his £20, and Thomas would have had to pay the whole of the £20, because, as he left a child behind him, he would not be entitled to any contribution from the second son on his taking the estate. That shews the inartificial way in which the clause is framed, but it appears to me that the whole object of the clause was to provide for an apportionment, as it were, of the charges accompanying the devolution of the estate from father to children, and then from the family of the eldest son to the second son and his family.

The opinion, therefore, which I have formed upon this case is that the decision which was arrived at by the Courts below, the learned judge before whom it first came and the Court of Appeal, is the correct decision, and therefore I should hope that your Lordships would confirm that decision, and that is the motion which I shall venture to propose.

I should like to say one word upon the subject of costs. I certainly have always held it to be a wholesome rule that the successful party in an appeal should have his costs and that the unsuccessful party should pay them; but of course there are occasional exceptions to this as there are to every other general rule, and your Lordships may think this a case for an exception, for this reason. The will is an extremely obscure one—and your Lordships differ as to the construction to be put upon it: the case has been very fully considered here, and very fully argued, much more fully than in the Courts below, and I am bound to say that it does not appear to me to have had (judging from the report of what passed in the Courts below) the amount of consideration there to which it was entitled. The difficulty is a difficulty which was created by the testatrix herself and not by the parties, and I am not altogether surprised that a further consideration of the case was sought for by the unsuccessful party in the Court below. If this were a case in which there was a fund out of which the costs could be paid, a fund of the testatrix available for paying the costs of settling the doubt which she herself has occasioned, probably the costs might have come out of that fund; but there is no such fund. I should very much like, if it met with your Lordships' approbation, to accompany the motion which I make with the addition that in this case there ought not to be any costs of the appeal. I move, however, in whatever is the proper form, that the conclusion which I have stated, and which, with great respect to my noble and learned friend on the woolsack, is different from that at which he has arrived, be the decision of your Lordships upon this appeal.

LORD BLACKBURN:—

My Lords, the only report which we have of the reasons given by the judges in the Court of Appeal is contained in the shorthand notes, not revised by the learned judges. It is apparent on the face of those notes that the writer, not being acquainted with the subject concerning which the judges were speaking, was unable to take a note of the sense of what the judges said; and no shorthand writer, however skilful, can be expected to take an accurate note of the words used when he does not understand their significance.

I think it is probable that the Master of the Rolls was more influenced by the consideration that the person who drew the will, Mary Thomas, was a person unacquainted with the significance of legal terms, than I should think right.

Though I am not able from the notes to form an opinion as to what Cotton L.J. said, I am sure he could not have used the words taken down as what he said. They are not intelligible, and no one who knows the clearness with which that learned judge expresses himself can for a moment suppose that he used unintelligible language; he seems to have given some weight to the want of skill of the person who penned the will, and I think that circumstance is not altogether to be rejected. Bowen L.J. does not seem to have entered much on the reasons.

After the first argument of the case, I came to the conclusion that the decision of the Court of Appeal was right, though whether for the same reasons delivered by Cotton L.J. or not I cannot tell, as I do not know what were the reasons he delivered. But the Lord Chancellor has arrived at a different conclusion.

I need hardly say that I have read what he has written with great attention, and with a sincere desire to see where the difference of opinion really lay, and, I hope, with a candid wish to be convinced of my error, if it was one.

I have, since the second argument, made some alterations in what I had before written, and I wish to point out, more distinctly than I could do before, what is the only point on which I think there is a difference in opinion between me and the Lord Chancellor, and why I still think that the judgment should be affirmed.

The respondent Lewis commenced this action on the 1st of March 1880 to recover possession of a farm called Carvarchell, of which the appellant, John Keys Thomas, had taken possession on the death of Jane Catharine Thomas in 1878.

Both parties claimed under the will of Mary Thomas, made in 1820, in which year she died. The construction of that will, therefore, is not affected by the 28th or 29th sections of the 7 Will. 4 & 1 Vict. c. 26.

Mary Thomas at the time of her death was a widow, having two sons, Thomas Clement Thomas, the eldest, whom, in her will, she calls Thomas Thomas, who, at the time of her death, was unmarried, and who, though he after her death married, never had any children; he died in 1862. She had a second son, William, who died in 1874, leaving two children, the appellant, John Keys Thomas, and a daughter Catharine. We are not told when these children of William were born; but, in the absence of any statement to the contrary, I think we should, from the language of the will, which I shall presently quote, infer that William had not any children at the time when the will was made. The testatrix had also six daughters then living, one of whom was Mary Bevan. I do not think there is anything else in the state of the testatrix's family which is material. The testatrix, at the time she made her will, and at the time of her death, was seised in fee of the farm in question, which is of a freehold tenure. It was then and still is let for £14 a year. We are not told anything more about her other property, but from the nature of the provisions in her will it must have been small.

I think it convenient now to read the material part of the will of Mary Thomas: "I give and devise unto my eldest son Thomas Thomas all my real and freehold estate, and all leases and leasehold premises now in my possession (subject to the payment of the rents and the performance of the covenants mentioned in the said indentures of leases), during the term of his natural life, and after his decease to his legitimate child or children, if there be any, but if he dies without issue, my will is it may go unto my other son William Thomas during the term of his natural life, and afterwards to his legitimate child or children, if any, but if he should likewise die without issue my will is it may go to my daughter Mary Bevan, and to her heirs and assigns for ever."

Then followed some pecuniary legacies, which I think do not throw any light on the construction of what went before. On the second argument it was pointed out that some expressions in this part of the will had a tendency, so far as they went, to favour the construction that Thomas took an estate tail. I do not however rely on those. She made her son Thomas a residuary devisee and legatee, and appointed him her executor.

I think that in construing a will we are to inquire what is the intention of the testator shewn by the words of the will, and that we ought to inquire into all relating to the property and state of the family, and in short into all the circumstances which the testator would or ought to consider when making his will, and then say, not what was the intention expressed by such words in the abstract, but what is the intention expressed by such words used with reference to such circumstances.

I do not think that I could in any way better express what I think are the rules of construction than in the words of the judgment in the Privy Council delivered (and probably written) by Lord Kingsdown in *Towns* v. *Wentworth* (1), to which I refer. It is there said, "The application of these rules is often attended with very great difficulty, as the number of cases found in the books upon the subject, not always very easily reconcilable with

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(1) 11 Moo. P. C. 543.

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each other, sufficiently testifies; but in the present case" (i.e., that before the Privy Council) "their Lordships do not think that the application is attended with any serious difficulty."

In the present case, I mean on the construction of the will before this House, I think there is serious difficulty.

I do not think it too much to say that the only thing that is perfectly clear on this will is, that the testatrix intended to give her son Thomas a life estate in this farm.

The person, whoever he was, who framed the will, for I do not suppose the testatrix penned it herself, has been singularly unfortunate in the choice of ambiguous phrases, from which it is very difficult to say what intention was expressed. I am quite sure Mary Thomas did not understand them, nor do I think the person who framed the will did. But the Court must, I think, construe the will according to the proper meaning of those phrases, unless there is something in the context or the subject matter to justify a departure from that meaning.

A conveyance to a person without any words of limitation gives him no more than an estate for life; and in wills not affected by 7 Will. 4 & 1 Vict. c. 26 s. 28, the same rule applied where the land was devised. But when the testator was owner of the fee, and used any words which reasonably interpreted shewed that the intention was to devise the inheritance which he had, effect was given to his intention; the inheritance passed, though there were no words of limitation attached, to the objects of the testator's bounty.

The devise of "all my freehold estate" may mean the "farm" of Carvarchell, which is of freehold tenure; or it may mean "the estate which I have in Carvarchell, that is, the fee simple and inheritance in that farm."

It is immaterial as far as regards the estates given to Thomas and William what meaning is put on these words, for their estates are by express words confined to life estates, and it is immaterial as to the estate given to Mary Bevan, which is by express terms made a fee simple; but the question what intention is expressed by the clause "and after his (Thomas's) decease to his legitimate child or children (if there be any), but if he dies without issue my will is it may go to my other son," may be affected by these words.

I may here say at once that I agree with the Lord Chancellor, and, as I think, with Cotton L.J. and in that respect, I think, differ from the Master of the Rolls, that if the devise had been to "Thomas of all my real and freehold estate during the term of his natural life, and after his decease to his legitimate child or children if there be any," and had stopped there, the words would have been quite sufficient to give the children a fee. But I still differ from the Lord Chancellor in thinking that the construction of the clause which follows is not affected by these words, and that the devise to William is not thereby made contingent. I shall return to this later.

There was also in wills not affected by 7 Will. 4 & 1 Vict. c. 26 s. 29, an effect given to a devise over after the death of one to whom an estate for life was given "if he die without issue." Primâ facie these words meant on an indefinite failure of his issue, and are exactly equivalent to "on the extinction of the heirs of his body," and that is held by implication to express an intention that the heirs of the body of the devisee for life shall take. They cannot take as purchasers; and therefore these words are construed as words of limitation and give the devisee for life an estate tail. But if there be enough on the face of the will to shew that the words "die without issue" do not mean on an indefinite failure of issue, but are by the context or other legitimate grounds of construction shewn to have been used as meaning "if no such issue shall be born" or "never having had issue," or "die without leaving issue living at his death," the will might be construed according to the meaning. Before 1837 the presumption was against such a construction, but it was only a presumption.

Lastly, the words "child or children" primarily mean issue in the first generation only, sons and daughters, to the exclusion of grandchildren or other remoter descendants. Here also, if there is enough to justify the construction, the words may be read as equivalent to issue or heirs of the body; but it requires something to justify the reading the words in what is not their primary sense.

Now the person who drew this will has (without, I should say, thinking what their effect was) used all these phrases. And I think there are three constructions, and no more, that may plausibly be put on the will.

The testatrix has expressed clearly her intention to be that Carvarchell should go to Thomas for life. It is to go after his death according to the intention expressed in the will. She may be held to have expressed,—First, an intention that it should go to the heirs of Thomas's body, and when they died out to William for life, then to the heirs of his body, and when they died out to Mary Bevan in fee; second, an intention that it should go to the children (in the sense of the sons and daughters) of Thomas, if any there should be, as joint tenants for life, and subject to this life interest, contingent on some such child being born, to the heirs of the body of Thomas, including grandchildren and remoter descendants, and when they died out to William for life, then contingently to his children as joint tenants for life, then to the heirs of William's body, and then to Mary Bevan in fee.

If either of these two constructions is adopted, Thomas took an estate tail prior to the estates given to William and his children and to Mary Bevan, and by barring that estate tail acquired the fee simple, and the respondent is entitled. As he never had children the contingent life estate given on the second construction to them never came into operation.

The third construction is, that she has expressed an intention that on the decease of Thomas the fee should go to Thomas's children (contingently on any being born) as joint tenants in fee simple, and if no such child was born, then as an alternative contingent devise to William for life, and on his decease to William's children (contingently on any such being born) as joint tenants in fee simple, and, as an alternative contingency, if no child of William was born, to Mary Bevan, in fee simple.

I see no fourth construction that can possibly be put on the will, and there are objections to all three.

The first construction puts on the words "child or children" the meaning of issue so as to include all heirs of the body of Thomas. It is very likely that the testatrix, if asked whether she meant by those words to include grandchildren or remoter descendants of Thomas, would have said she did, but I see nothing on the face of the will to justify the Court in putting this more extended meaning on the words, and I therefore reject the first construction.

The second construction gives the primâ facie meaning both to the word "children" and to the phrase "die without issue." By it the testatrix gives a life interest as joint tenants to the children of her son. She had herself eight children living when she made her will, and she must, therefore, if she had reflected, have known that her sons might have so many children, that if they took this small property as joint tenants for life they would only have a few shillings a year each. And this would be so inconvenient a disposition of the property that, I think, if her attention had been called to it, she would not have made such a disposition.

In the event that has happened of Thomas never having children this has produced no effect; but I scarcely see how the will can be read so as to avoid saying that such is the disposition made, and I therefore adopt this second construction.

I dare say that she did not know that Thomas, if a tenant in tail, would have power to acquire the fee simple. If she did know it, I dare say she did not wish him to exercise that power; perhaps she might have hoped that he, the object of her bounty, would respect her wishes, and not exercise the power without some sufficient reason. I cannot speculate as to this.

I do not think, that, since the decision of this House in *Roddy* v. *Fitzgerald* (1), it is open to dispute that a rule is established. Whether we word the reason for it as Lord Eldon did in *Jesson* v. *Wright* (2), or, as Lord Wensleydale prefers it, as it was expressed in *Doe* v. *Gallini* (3), the rule is established that if a testator does express an intention that A. shall have the estate for life, and on the failure of the heirs of the body of A. the estate shall go over, the effect is that an estate tail is given to A. by necessary implication, as otherwise all the subsequent limitations would be too remote. Lord Cranworth says, in *Roddy* v. *Fitzgerald* (1), that one cannot but feel that in many cases the real wish of the testator, instead of being carried into effect, is defeated by this rule. And I think this is true, but in this case the third construction would be likely to still more defeat her probable wishes.

(1) 6 H. L. C. 823. (2) 2 Bli. 1. (3) 5 B. & Ad. 621.

It is no doubt very likely that Mary Thomas did not know that her son Thomas, if he took an estate tail, could by barring it acquire the fee simple. And if the matter had been explained to her, she might have devised Carvarchell to her sons Thomas and William in strict settlement, with remainder to Mary in fee. That would, I think, have come as near to what she probably wished as the rules of law permit. But that she certainly has not done. She might have made the disposition which I have called the third construction, and no doubt by so doing she would prevent Thomas from barring the entail. That is what it is said she has done, but it is so eminently injudicious that I think she could never have wished to do it. She herself had eight children living at the time of her death. She must have known that Thomas might have as many or more, and could hardly have wished to give so many persons a joint interest either for life or in fee in so small a property.

In the not improbable event of Thomas having one child, who died soon after its birth, and never having any other, the estate in fee would on the birth of that child vest in it, and on its death vest in its heir, defeating the subsequent estates as effectually as if Thomas took an estate tail and barred it. In the not improbable event of Thomas having two or more children, one of whom married and died in the lifetime of Thomas, leaving a surviving brother or sister and also issue, the issue would, unless steps had been taken before its parent's death to sever the joint tenancy, be wholly disinherited. The testatrix could never really have wished to do all this, if she understood its effect, but no doubt she may have said so, and then, however injudicious we may think her will, we must carry it out. But we ought not to strain the words used even to produce a reasonable result, certainly not to produce a foolish one.

If there was a sufficiently expressed intention to give the children estates in fee, it would be enough to justify putting on the words "die without issue" the sense "die without having had such issue, i.e., a child at all." Or, rather, the authorities cited by the Lord Chancellor I think would require us to put that construction on those words. Therefore, as it seems to me, the difference of opinion between the Lord Chancellor and myself is reduced to the small but not easy question, is there a sufficiently expressed intention to give the children an inheritance? Sufficiently expressed to justify the Court in altering the meaning of the expression "but if he dies without issue" from its primary meaning. I notice, without relying on them, that it is in many cases said that to do so, the intention should be "clearly expressed;" I prefer to say sufficiently expressed.

It seems to me that such an intention is not expressed at all, unless the fact that the devise is of the fee simple necessarily shews an intention to give the children a fee simple. Now, I think that a devise of the fee simple of a particular estate to A. and after his decease to B. was enough (before 1837) to give B., the ultimate devisee, the inheritance. But I do not think a devise of the inheritance to A. and after his decease to B. and then to C., could be held to shew an intention to give the inheritance to B., though it would shew an intention to give it to the ultimate devisee. Still less could a devise to A. and after his decease to B. and then to C. and his heirs, shew any intention to give B. the inheritance which is expressly given to C. And I have been unable to see any reason why it should be different, if B. is described as being the unborn child of a designated person, whose estate is therefore necessarily contingent till such a child is born. I think the testatrix, if she had been told that if either Thomas or William has a child who dies an hour after its birth, and Thomas and William both die without any more children being born to either, neither Mary Bevan nor her heirs will, under the will as you have worded it, take anything; she would have said, "That is not what I wished or meant to say." I think it is not what she has said.

In *Wilkinson* v. *Chapman* (1), which was relied on on behalf of the appellants, the estate was given first to the testator's daughter, but he added, "her heirs and assigns," and no doubt could arise that she took in fee, whether the word "estate" meant land or inheritance. And then on the contingency of her dying under age and without lawful issue, he devised his estate to his wife for her life, so that, whether the word "estate" meant land or inheritance, she took only for life, and then the ultimate devise was to the children of John Hipworth, late of Walcot, to be equally divided among them, share and share alike, as tenants in common. From the report of the case I infer that John Hipworth was dead when the will was made, and that the children of John Hipworth was a designation of five persons then alive; it was held that those five persons, the ultimate devisees, took the inheritance. In the present case the person who drew the will has raised the very same difficulty which Lord Gifford afterwards points out. "the freehold estate" is given to Thomas, and afterwards to William for life only, and it is ultimately given to Mary Bevan in fee. Lord Gifford held that the intention appeared to give the inheritance to the ultimate devisees. But I cannot think this case an authority for saying that where the ultimate devise is in fee the intermediate estate, given without any words of limitation, is to be enlarged into an estate of inheritance, but only that the ultimate devise, if not expressed to be in fee, is so to be enlarged.

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(1) 3 Russ. 145.

And I also think that if there is a devise of the inheritance to A. for life, and then that the inheritance shall go, on one contingency, to B. and, upon the contingency of the devise to B. not taking effect, to C., there would be enough to give B. or C., as the case might be, an estate in fee simple, and I do not think that would be different if the words of limitation were appended to the alternate devise to C. and not to that to B., or vice versâ. That is what I understand to be decided in *Montgomery* v. *Montgomery* (1).

But I do not think there is either principle or authority for saying that the use of words importing that the inheritance is to be disposed of is to have any effect on the question whether the devise is an alternate contingent fee or not. If there is enough to shew an intention to give the children an estate in fee, then it follows that the subsequent devise is an alternative contingent devise, and the words are enough to give effect to the intention to give the children an estate of inheritance.

But here I have failed to see anything to justify us in reading the words used by the testatrix in any other than their primary sense. I therefore reject the third construction.

(1) 3 J. & Lat. 47.

It is not material whether the first or second construction is adopted. Either way the order appealed against is right. But I think the second is the true construction.

I think the appeal should be dismissed.

As to costs, I do not think it necessary to say anything. The whole money value of the little property, and much more, must have been spent in litigation.

LORD BRAMWELL:—

My Lords, this is one of a class of cases to which the ordinary rules of construction do not apply, I mean the rules that the intention of the testator is to govern, and that intention is to be ascertained from the meaning of the words he has used. The rule in *Shelley's Case* (1) has to be considered; a rule which may have had some reason in it when it was invented, but which when applied almost invariably frustrates the intention of the testator, which ought to be ascertained. A rule of construction has to be adopted as to wills of the date of that in question, confessedly wrong and condemned by the legislature, and reasoning is used in my judgment wholly erroneous, viz. to suppose a testator contemplates all the possible consequences of various interpretations, and then to say, if there is one he would not have meant if he had thought of it, that he did not mean what he has plainly said; not bearing in mind that in many cases he had not thought of the consequence, and had therefore no intention as to it one way or the other, and a particular expressed intention is disregarded in favour of some supposed general intention.

If ordinary rules governed this case, and I did not know that contrary opinions were held, I should say it was very plain—not speaking presumptuously but with a perfect consciousness that this is one of a class of cases with which I am not familiar. I will give my reasons. The testatrix gave Thomas an estate for life; in words and in intention she affirmatively gave no more, negatively she meant to give no more. She gave to his child, if he had only one, to his children if more than one, an estate in fee simple. My reasons for saying so are these. She was dealing with the fee simple. She speaks of her real and freehold estate. She accompanies it with a gift of "all leases, &c.," using language to pass the whole property if she had any. She says afterwards that if that devise fails "it" may go to William for life, &c., and if those devises fail "it" may go to Mary Bevan in fee simple. The "it" is the "real and freehold estate," i.e. the fee. Now I understand that it is admitted that if there was nothing else there would have been a fee simple given to the child or children of Thomas. As to the argument that if so, and a child had been born to Thomas and died, Thomas would have been its heir, which she did not intend, the answer is she did not intend the contrary. She never thought of it. But there is something else, and as was said by the noble and learned Earl opposite (Earl Cairns) during the argument, the whole must be taken together, and it would be as great a mistake to take one part and say it shewed a fee simple, and then disregard the rest, as it would be to take the other part and say it shewed an estate tail, disregarding the first part.

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(1) 1 Rep. 93 b.

Now the other matters are these: There is the devise to Mary Bevan, "her heirs and assigns for ever." It is said that this shews she knew how to create a fee simple, and that she would have put in these words of inheritance had she meant to give an estate of inheritance to the child or children of Thomas. This was hardly insisted on by Mr. Rowlands. I am of opinion there is no foundation for it. Whoever drew the will thought, when he came to the ultimate devise, it was right to put in "heirs and assigns for ever," and did so. He did not think it necessary to put these words in before. It is impossible, on a speculation of this sort, to disregard otherwise plain language.

Another matter relied on is this. The testatrix says, "but if he (Thomas) dies without issue, my will is it may go," &c., and it is said this means an indefinite failure of issue, which shews that the testatrix was giving an estate tail to the issue of Thomas. I think not, for these reasons. It compels the leaving out of the words "child or children," or the substituting for them of the words "issue," or adding after "children" the words "in succession," or some such expression. Further, in a subsequent part of the will the testatrix, speaking of Thomas, uses the words "leaving no issue," to signify leaving no issue at his death. The argument comes to this:—As I have said the will down to "but" after "if there be any" &c. gives a fee simple as plainly as though the words "their heirs and assigns for ever" had been after the word "children." If these had been there the subsequent words would not have affected them, yet an equivocal expression following them is to control and supersede a plain expression and give it a different meaning with this result, that if Thomas had not barred the entail his eldest son would have taken, to the exclusion of daughters and other sons. Leaving out the effect of the word "estate," if the words "child or children" stood alone, then by virtue of a long established rule in a will of this date an estate of inheritance would not be given; but it does seem strange that those words, not standing alone but being part of a long sentence, the entire sentence is to be wrongly construed, there being no rule to compel that.

On these considerations I think the judgment wrong, and that it should be reversed. As to the actual intention of the testatrix, with all submission I have not a doubt. Whether it is interpretation, or guess, or speculation, it is clear to me that she meant the child or children of Thomas to take the realty out and out, as they would have taken a lease had she had any, or £1000 Consols if she had them, and they had been mentioned after "premises." I must add that as well as I can understand the cases they favour my view. None seem opposed to it.

LORD FITZGERALD:—

My Lords, when such very great authorities as the noble and learned Lords who have preceded me differ in opinion, I need not say that I express mine with diffidence and hesitation.

The question immediately before us is whether the devise after the decease of Thomas "to his legitimate child or children (if there be any)" would give them an estate in fee as purchasers or an estate for life only. If that devise conferred on them an estate in fee simple as purchasers, that is to say, an absolute fee simple, it could not be denied that the defendants (appellants) are entitled; but if the children, if any, would take an estate for life only, then it is equally conceded that Thomas took an estate tail

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by implication and the plaintiff is entitled to your Lordships' judgment.

We may well say with Lord Wensleydale, in *Roddy* v. *Fitzgerald* (1), that "the present case is of consequence, not from the value of the property at stake, but on account of the paramount importance of adhering to fixed principles of decision, which affords the only chance of attaining a reasonable degree of certainty in the construction of wills." It was because of its great importance in that view that the noble and learned Earl on the woolsack directed a re-argument of the case, so as to secure further deliberation and give greater weight to the decision of this House.

Lord Eldon is reported to have said in *Jesson* v. *Wright* (2) that his mind was overpowered by the cases and the subtlety of the distinctions between them. How truly I may apply that language to myself in the present instance, but from an early stage of the argument I have been of opinion that the decision in the Courts below was correct and should be upheld, and I am obliged to confess an almost superstitious veneration for the rule in *Shelley's Case* (3), and for *Jesson* v. *Wright* (2), and *Roddy* v. *Fitzgerald* (4).

We are, no doubt, to endeavour to reach the meaning of the words the testatrix has used and to give effect to her paramount intention. Collecting, then, her predominating general intention from the context of the will, I cannot doubt that intention to have been that the estate should go in the first instance to Thomas and his issue, and should not pass over to William until the line of Thomas's descendants had been completely exhausted.

We are bound if we can consistently with the language of the will to give effect to that general intention.

There is no doubt that "all my real and freehold estate" may be sufficient to confer a fee simple, but "estate" is a term the meaning and use of which must be determined by the context; and it does not follow that because the testatrix was dealing with and intended to deal with the inheritance, and may have used the term as representing not only the farm itself but the inheritance in that farm, that therefore she is to be taken to have expressed an intention to give the children of Thomas (if any) the whole of that inheritance in fee. A very eminent judge, one of the learned judges who answered the questions put by your Lordships' House, made an observation in *Roddy* v. *Fitzgerald* (1) which is peculiarly applicable here. He there said: "The testator did not intend that if a child was born to William and lived a few hours, that such child should take so as to confer a title on his heirs." Substituting "Thomas" for "William," the sentence is exactly applicable to the present case. That eminent judge used the expressions I have quoted in a somewhat different sense, and if he erred then in his conclusion, and if my noble and learned friend beside me (Lord Bramwell) has erred now in his opinion, he has erred on both occasions in very distinguished company. If there had been nothing more in the will after the words "to his legitimate child or children" there could be no question but that the children would take the inheritance in fee, but we must interpret the devise to them by the words which immediately follow "but if he dies without issue." That sentence is a sentence of art on which a meaning is put by the highest authorities and from which it is not desirable we should depart on speculation. We had better adhere to great rules than raise any nice distinctions to enable us to vary from them.

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(1) 6 H. L. C. 884.

(2) 2 Bli. 1, 50.

(3) 1 Rep. 93 b.

(4) 6 H. L. C. 823.

"Issue" is, no doubt, not so rigid as "heirs of the body" and may be interpreted as a word of purchase or a word of limitation, as may best effectuate the general intention; but the sentence "if he dies without issue" is one of art and, as interpreted by authority at the time this will was made, meant, primâ facie, an indefinite failure of issue. I can find nothing in this will to induce me to depart from that meaning or to lead to the conclusion that "issue" should be interpreted as "children." The meaning of the sentence is, I think, shewn and the pervading intention indicated by that subsequent portion of the will which commences "But this bequest and devise is nevertheless subject to the following payments and restrictions," and in which the testatrix uses the expressions "and leaving no issue" and "should

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(1) 6 H. L. C. 851.

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his successor die without legitimate issue," and indicates very clearly to my mind her general and paramount intention that Thomas's "successor," William, was to take only on the exhaustion of Thomas's line of descendants, and that Mary Bevan's line was to succeed only on failure of William's line.

I have to apologise for having said even these few words. I do not intend to criticise the authorities, nor can I usefully do more than state my general conclusions. It seems to me that "if he dies without issue" must be interpreted as pointing to an indefinite failure of issue, and that on the true construction of this will the estate would go to the children of Thomas for life only, and subject to that life interest to the descendants of Thomas, and on failure of Thomas's line then to William. The consequence is that Thomas took an estate tail by implication, and he having barred that estate and acquired the fee, the plaintiff is entitled.

Order appealed from affirmed and appeal dismissed.

Lords' Journals 4th August 1884.

Solicitors for appellants: *Speechley, Mumford & Landon*, for *Johnson & Stead, Llanelly.*

Solicitors for respondent: *Crowder, Anstie & Vizard*, for *J. M. Williams, St. David's, Pembrokeshire.*

[HOUSE OF LORDS.]

H. L. (E.)
1884
July 4.

GREAT EASTERN RAILWAY COMPANY . . . APPELLANTS;

AND

SIR JULIAN GOLDSMID, BARONET, HELEN LUCAS, FREDERIC DAVID MOCATTA, AND MARY ADA HIS WIFE, AND ROBERT HORNER . . . . RESPONDENTS.

Market—Disturbance—Charter, Force of—Waiver of Statutory Rights—Accommodation provided by Lord of Market.

A charter of 1st Edward III. made by the King "with the assent of the prelates, earls, barons, and all the commons of our realm assembled in our present Parliament," granted to the citizens of the city of London certain privileges, and among them "that no market within seven miles round about the city shall be granted by us or our heirs to any one." By letters patent in the 34th Charles II., reciting an inquisition founded on a writ of ad quod damnum, the King granted to the respondents' predecessor in title the right of holding markets on Thursday and Saturday in every week in Spittal Square, within the seven miles.

User of the market was proved since 1723. The appellant company set up a depôt or row of stalls at their terminus within 300 yards of Spittal Square and let them to dealers for the purpose of selling fruit and vegetables brought up by their railway, and justified their depôt on the ground that the respondents' market was very crowded, that it was difficult for dealers to get stalls there, and that if any persons other than the respondents' tenants wished to sell in the respondents' market there would be no room for them; and that the respondents' market infringed the provisions of certain Paving Acts:—

Held, affirming the decision of the Court of Appeal, that the charter of Edward III. had, at the most, the force of a private or personal statute, and concerned the corporation of London only and not the general public; that the consent of the corporation was to be presumed to the letters patent of Charles II.; that the letters patent of Charles II. conferred a valid right of market; that the company's depôt was in fact a rival market, and a disturbance of the respondents' right of market, and entitled the respondents to an injunction to restrain the company from using their depôt in the above manner or so as to interfere with the respondents' rights; and that even if the company had proved that there was not sufficient accommodation in the respondents' market, or that the Paving Acts had been infringed, those circumstances would have afforded no answer to the action for an injunction.

APPEAL from an order of the Court of Appeal (Cotton, Lindley and Fry L.JJ.) The pleadings and the evidence at the trial before Bacon V.C., the further evidence adduced before the Court of Appeal, and the form of the order made by that Court, are set out at length in the report of the decision below (1). For the present report the statement in the head-note is sufficient. The following is an outline of the arguments upon the present appeal, which were substantially the same as those urged before the Court of Appeal.

June 26, 27, 30. July 1, 3, 4. *Hemming* Q.C. and *A. Charles* Q.C. (*N. R. Smart* with them) for the appellants. The first question is whether the charters of Charles II. and James II., under which the market of the respondents was established, were not void in consequence of the existence of the charter of Edward III. The charter of Edward III. has the validity of an Act of Parliament; Bohun's Privilegia Londini p. 80; and conferred privileges not so much on the City as on its citizens, amongst others freedom from the monopoly of a market, and it could only be revoked by an Act of Parliament.

As to the nature of charter rolls, see Introduction to the Revised Statutes pp. xii–xv. The mere fact of presence in the charter roll and absence from the statute roll is not conclusive against the document being a statute. "By the assent of Parliament" is equivalent to the authority of Parliament: *Earl of Oxford's Case* (2); *Nicholas' Devon Peerage Case*, p. 142, App. p. clvi.

The charter of Edward III. having the force of a statute, and the clause being a clause in a general charter, the privilege is conferred on everybody; creating a public interest which the City cannot give away or waive, being trustees for other persons: *Goodman* v. *Mayor of Saltash*, per Earl Cairns (3). This being so, the charter of Charles II. was void against all the world: *Prince's Case* (4); *Islington Market Bill* (5).

If the Crown after granting a lease grants the fee the grant is not merely cut down (as in the case of a grant by a private individual) to a grant of the reversion, but the later grant is void altogether; for the Crown has been deceived; and a private person may set this up for his own benefit against the Crown: *The Monopolies' Case* (1); *Alcock* v. *Cooke* (2); *Gledstanes* v. *Earl of Sandwich* (3). If the patent is void any one may plead non concessit without a scire facias: Com. Dig. tit. Patent, F. 1. Repeal of Patent.

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(1) 25 Ch. D. 511–515, 529, 558. For "Robert Horan," p. 512, 4th line from bottom, read "Robert Horner." He was a respondent in the present appeal.

(2) Sir W. Jones, 101, 103.

(3) 7 App. Cas. 633.

(4) 8 Rep. 1 a, 8 b, 9 b.

(5) 3 Cl. & F. 513.

The charter of Edward III. was intended to confer personal privileges on the citizens, not on the corporation as such. The Crown cannot derogate from its own prerogative of granting markets except by an Act of Parliament: *Islington Market Bill* (4); *Gann* v. *Free Fishers of Whitstaple* (5) shews that the corporation could not have waived their right. But they would not (if they could) have waived their right while the quo warranto was pending. The respondents rely on user, but the user must be in accordance, not inconsistent, with the letters patent. Presumption from user must be limited to things which can legally be presumed; and there must be independent evidence that the thing can be lawfully done: *Dalton* v. *Angus* (6). The origin here is known and is invalid, and the user cannot be attributed to any other origin.

Secondly, it is the duty of the lord of the market to provide adequate space and accommodation to sell; and if he does not, any one may sell elsewhere: *Prince* v. *Lewis* (7) and *Mosley* v. *Walker* (8); which cases were considered by the judges in the *Islington Market Bill* (9). See also *Corporation of London* v. *Low* (10). The grant of a market does not of itself imply a right in the grantee to exclude persons from selling marketable commodities in their private shops within the limit of the franchise, on market days: see notes to *Yard* v. *Ford* (11); *Prior of Dunstable's Case* (12), commented on in *Mayor of Macclesfield* v. *Chapman* (13). As a matter of fact the evidence shews that there had been no appreciable loss to the lord of the market. If there was any loss it may have been on potatoes and carrots sold as roots, on which there were no tolls. And there was evidence that the appellants' depôt had been beneficial, enabling the salesmen at the respondents' market to supply themselves, and bringing more custom to the respondents' market. The respondents having taken tolls where they had no right have not shewn that their lawful tolls were diminished.

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(1) 11 Rep. 84 b.
(2) 5 Bing. 340.
(3) 4 Man. & G. 995.
(4) 3 Cl. & F. 513.
(5) 11 H. L. C. 192.
(6) 6 App. Cas. 740.
(7) 5 B. & C. 363.
(8) 7 B. & C. 40.
(9) 3 Cl. & F. 519.
(10) 42 L. T. (N.S.) 16.
(11) 2 Wm. Saund. (Ed. 1871) p. 501.
(12) Y. B. 11 Hen. 6. 19, a.
(13) 12 M. & W. 18, 20.

The Paving Acts (12 Geo. 3 c. 38, 28 Geo. 3 c. lx., and 57 Geo. 3 c. xxix.) shew that at the times when they passed respectively the market was confined to Spital Square, an area inadequate now, and they prohibit the extension of the market to the adjoining streets which has since taken place. This alone is a defence to the respondents' action. This market is confined to regular tenants of stalls as sellers. But a market should be a place of common resort for sellers where all may come, paying tolls but not being forced to hire stalls: *Mayor of Northampton* v. *Ward* (1); *R.* v. *Burdett* (2). There has been in fact no disturbance. The appellants have not established a rival market. They have merely let out the arch spaces as shops. Their tenants cannot be restrained from selling, any more than the occupiers of houses adjoining the market. If so the appellants cannot be acting illegally in letting the tenements. The fact that they are landlords of all the tenements is immaterial. As to the meaning of "shop," see *Fearon* v. *Mitchell* (3); *Pope* v. *Whalley* (4), which were decisions on the Markets and Fairs Clauses Act 1847 (10 & 11 Vict. c. 14) s. 13.

Sir *H. Giffard* Q.C. and *Cozens-Hardy* Q.C. (*Micklem* with them) for the respondents:—

The respondents contend that the depôt is a market. The tenants are bound by the terms of their agreements to keep their tenements open for the sale of marketable commodities, and to insure their doing so the tenancies are determinable at a month's notice. The appellants having rights of stallage, the letting of stalls is a disturbance even where the commodities sold are not subject to toll: *Mosley* v. *Chadwick* (1); *Corporation of Cork* v. *Shinkwin* (2). Insufficiency of accommodation does not cause a forfeiture of a market franchise but is merely a justification for a particular individual who sells elsewhere because he cannot find room in the market. General allegations of insufficiency are no defence to an action for disturbance by setting up a rival market: *Islington Market Bill* (3); *Blissett* v. *Hart* (4); *Blakey* v. *Dinsdale* (5); *Elwes* v. *Payne* (6).

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(1) 2 Stra. 1238.
(2) 1 Ld. Raym. 148.
(3) Law Rep. 7 Q. B. 690.
(4) 6 B. & S. 303.

[They were stopped from arguing the question of the validity of the charter of Charles II.]

Hemming Q.C. in reply:—

It has been established by the decisions in *Prince* v. *Lewis* (7) and *Mosley* v. *Walker* (8) and by the opinions of the judges in the *Islington Market Bill* (9) that (1) an individual has a good defence to an action for disturbance by selling outside the market if he could not get accommodation within; (2) if the accommodation is insufficient the Crown can avoid the charter by scire facias. *Corporation of Cork* v. *Shinkwin* (2) cannot be reconciled with *Prince* v. *Lewis* (7). *Blissett* v. *Hart* (4) turned on a point of pleading, whether it was necessary to aver sufficient accommodation in the declaration.

If the injunction be granted it should be so modified as to allow the appellants to let the arches to tenants who have applied for accommodation in the market and been unable to get it.

EARL OF SELBORNE L.C.:—

My Lords, this is an appeal against an injunction granted (with a slight variation of an order made by Bacon V.C.) on the 18th of December last, to restrain the defendants "from establishing a fruit and vegetable market at Bishopsgate, and from using or permitting to be used any portion of their station or property there in any such manner as to interfere with or prejudicially affect the rights of the plaintiffs in" the existing market, and also "from advertising any portion of their station or property at Bishopsgate as a market or a place used, or to be used, in any such manner as to interfere with or prejudicially affect the rights of the plaintiffs as hereinbefore declared," and for an inquiry as to damages. The declaration referred to is, "That the plaintiffs and others claiming under the charter of the 34 Car. 2 in the statement of claim mentioned are entitled to two markets every week" in what is now called Spitalfields Market.

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(1) 3 Doug. 117; 7 B. & C. 47, n.

(2) Smith & B. 395.

(3) 12 M. & W. 20, n.; 3 Cl. & F. 513.

(4) Willes, 508.

(5) 2 Cowp. 661.

(6) 12 Ch. D. 468.

(7) 5 B. & C. 363; 8 Dowl. & R. 121.

(8) 7 B. & C. 40.

(9) 12 M. & W. 20, n.; 3 Cl. & F. 516.

I cannot help observing, with some degree of satisfaction, the date of the order under appeal, because it at least shews that these parties have not been kept very long waiting for the ultimate decision of the question which they have raised in this suit.

Now, the first question which was raised in the action was as to the declaration contained in the order of the Court of Appeal; and in substance the proposition of the appellants upon that point is, that the charter of Charles II., the validity of which is in effect affirmed by that declaration, is in law void as contrary to an Act of Parliament passed in the first year of King Edward III. The document of the first year of Edward III., which is found in this print, may, I think, perhaps be justly reckoned, allowing for the difference of the usage of very ancient times from that of the times in which we live, as being in either the same category or a similar category with those statutes which we now call private, or local and personal, Acts of Parliament. To that extent I am disposed to go with the appellants' argument; and I think that the Court of Appeal went with the argument to that extent. My reasons for thinking so are, shortly stated, these. The document is one which does not appear upon the rolls of Parliament of that date, although those rolls are extant and apparently perfect. But it purports upon the face of it to have been made by "the King, with the assent of the prelates, earls, barons, and all the commons of the realm, assembled in" the then Parliament; and there certainly was a Parliament at that time, in that reign; and it ends with the words, "By the King himself and the whole council of Parlia-

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ment." It has been rightly pointed out in the argument at the bar, that, so far as form goes, the form is in those respects the same as that of the Prince's Charter granted in the eleventh year of the same reign; and in that year also we have seen, on referring to the statutes as printed by the Public Record Commissioners, that the Prince's Charter does not appear upon the rolls of Parliament, which are extant and perfect in that year as they are in the first year of the reign. And on turning to the report of the *Prince's Case* (1) it certainly does appear that though there was ample evidence of usage and long judicial and public recognition of the charter granted to the Prince in the 11th year of that reign, of a kind which is not on this record as to this particular charter, yet with regard to the form of the instrument, the very learned judges who had to consider the *Prince's Case* (1) were certainly of opinion that, primâ facie at all events, it was evidence of that which on the face of it was asserted, namely, the concurrence of Parliament in the grant of the Crown; and where, as in that case, public interests were concerned and things purported to be granted which could not possibly be granted without the assent of Parliament, the effect of an Act of Parliament was ascribed to the grant. I confess that I think it safest to treat this also as a document which, being in the same form, it is proper, so far as it is necessary or right, having regard to the context and nature of the document itself, to regard as being not the sole act of the King, but an act of the King (he being then a minor of very tender years) with the assent of Parliament; and, therefore, that if there be any things in it to which the assent of Parliament was necessary, as perhaps there may be, the grantees will have the benefit of the assent of Parliament in respect of those matters.

But that does not absolve your Lordships from the necessity of considering what sort of grant it is, though made by the King with the assent of Parliament. In the roll which is referred to, the marginal entry is, according to my recollection (it is not printed here), "To the Citizens of London;" and the entire context and contents of the document are conclusive to my mind that this is simply a charter to the citizens of London by the Crown, (and by "the Citizens of London" I understand to be meant the corporation of the city of London)—a charter by the Crown to the corporation of the city of London, confirmed by Parliament. It is, therefore, strictly in the nature of a grant of a private, or at all events, a local and personal Act of Parliament, and ought to be construed and to receive effect according to its nature. I will not trouble your Lordships by travelling all through the document and through every part of it; but it appears to me that in every part the evidence of that character and nature is perfectly conclusive. It begins, "The King to the Archbishops," and so on, "greeting"—a form which, although perfectly consistent with the assent of Parliament, yet indicates that the thing is, properly considered, a grant by the Crown which Parliament has enabled the Crown to make—"Know ye that we for the advancement of our city of London and for the good and commendable service which our beloved the mayor, aldermen, and commonalty of the aforesaid city have heretofore in manifold ways shewn unto us and our progenitors, with the assent of" Parliament, "have confirmed for us and our heirs to the citizens of the city aforesaid the liberties underwritten." And I cannot but think that on the face of the document this is pretty strong evidence that, if not all, at all events the greater part of the subject-matters of the grant are liberties previously granted, with or without sufficient authority, and now to be confirmed, and not matters of independent legislation. In the first place, there is a confirmation of former charters notwithstanding the impeachment of them at divers eyres and in the Courts of the King's progenitors. Then it goes on, "We will and grant for us and our heirs that the same citizens may have their liberties according to the form of the Great Charter," and that those impediments and usurpations should be revoked and annulled. I am not now going through every passage where this occurs, but over and over again in the charter, and in a manner which covers really every portion of it, you have these words, "We will and grant," "We will and grant," this and that. And at page 12 (coming to the particular matter now in question) similar words occur as to the matter now in controversy. "Also we have granted that the foreign lands and tenements of the said citizens who have been or hereafter shall be officers of the aforesaid city shall be bound to save the said city harmless towards us and our heirs in those matters which concern their offices equally with their tenements within the same city. And that" (that is, "We have granted that") "no market within seven miles round about the aforesaid city shall be granted by us or our heirs to any one. And that all inquests," and so forth. And then the whole thing winds up with these words: "Wherefore we will and strictly command for us and our heirs that the aforesaid citizens and their heirs and successors shall have all the liberties and free customs aforesaid and the same shall use and enjoy for ever in form abovesaid." It is quite plain, that there were certain liberties and customs and privileges granted before, that is the inference which I draw from the very words of the document—at all events granted before to a very great extent; and which words, "liberties and free customs" and privileges comprehend everything in the grant. They are granted to the citizens of London, "their heirs and successors." What is the meaning of those words, "the citizens their heirs and successors?" It was argued at the bar (I do not know that it would make any difference for the purpose of the present case even if the argument were well founded) that this was a grant not merely to the corporation and its successors, but to the citizens as individuals and to their heirs. Looking at the whole of the document, and trying that by many particular instances which occur, I apprehend that it is absolutely absurd and wholly impossible to suppose that anything of the kind can have been intended. A grant that the mayor shall always be one of the justices assigned for the delivery of the gaol at Newgate, to the citizens their heirs and successors, can only be a grant to the corporation, and manifestly is a grant to the corporation. The citizens are members of the corporation—the commonalty of the corporation are citizens, and in all the grants to the corporation the citizens participate according to the internal constitution of the corporation; and if, as seems to be the case, some portions of the grants to the corporation here made or here confirmed are specially beneficial to individual citizens, that does not in the least degree alter the character of the grants as being made to the corporate body, and in which the citizens as far as they are interested are included inasmuch as they can take through the corporation of which they are members, and by means of a grant to the corporation.

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(1) 8 Rep. 1 a.

That being the general character of the document, I think it conclusively results, that it is, as I have said, at the most in the nature of a royal grant, confirmed by Parliament, to the corporation of London; which, although a most important body, yet is not a body intrusted with the general public government of the realm, and whose privileges are special privileges, and not matters of general legislation. It is, therefore, at the most to be treated as having the authority of Parliament to the extent which is necessary for those purposes. It is at the most in the nature of what at this day we call a private or personal Act, a parliamentary assurance. That being so, and it being to be inferred, I think, from the document itself, at all events it being notorious aliunde, that this ancient and immemorial corporation had certain market rights within the limits of the City, which market rights according to the general presumption of law would be entitled to a certain amount of protection, primâ facie extending to a distance of nearly seven miles from the places in which they might be exercised, we find in this grant to the corporation those words which I have read, "We have granted that no market within seven miles round about the aforesaid city shall be granted by us or our heirs to any one." What is the true construction of such words in such a grant? Manifestly, as I understand, that it shall not be granted in derogation or prejudice of the rights, grants, and privileges of the city of London. If that be its true meaning and construction, it is not to be turned into a general law for the general benefit of all the subjects of the realm, that there never shall be an exercise of the royal power to make any such grant within those limits. It is a jus introductum for the particular benefit of the city of London, and it falls within the general principle of law, "Unusquisque potest renunciare juri pro se introducto;" a principle not only of ancient but also of modern application, applicable even where Acts of Parliament have been passed of a much more public character. In such cases, when the rights given have been only private rights, unless there has been also in the Act of Parliament a clause excluding a power of contract, it has been held that by contract or by voluntary renunciation such rights, as far as they are personal rights, may be parted with and renounced.

Therefore, there is nothing in this document which goes further at all events than this, that the city of London would have had a right to complain if a grant of this description, which is here promised not to be made, should have been made to their prejudice and without their consent. I will not say whether, if they could have complained, under possible circumstances other people might, or might not, have complained also. That is not at present, in my view of the case, necessary. But the question is whether you can hold the Court of Appeal to have been wrong in determining that, notwithstanding this ancient charter confirmed by Parliament, of the first year of King Edward III., the charter granted 356 years afterwards by King Charles II. for the erection of the Spitalfields Market is not legally and necessarily void and invalid, so that not only the city of London, but any one else in the world, can treat it as a nullity. The Court of Appeal thought that no such consequence was a legitimate result in law of the charter of King Edward III. I think the same. In the first place the whole period of 356 years from the 1st of Edward III. to the 34th of Charles II. is in this case, upon the evidence, a mere blank. It is not as in the *Prince's Case* (1), where you have evidence of the things done under the grant during a long course of time, and constantly receiving public recognition; but it is perfectly consistent with the evidence which you have in the present case that this particular privilege of the City may have been waived over and over again, either with the actual consent of the City upon particular occasions, or in a more general way. There are facts appearing incidentally, independently of those directly in controversy here, which strongly suggest the probability that that may have been the case in point of fact, and at all events warn your Lordships most powerfully against any rash conclusions to the contrary; because it appears incidentally in this evidence, that the Spitalfields Market is not the only market now existing within the limit of seven miles from the city of London, of which the city of London, so far as appears, is not the owner, though indeed the argument for the appellants went to the length that the Crown could not have given any such market to the City itself. We find that there is Covent Garden Market, of which it has been admitted that the origin was not in any Act of Parliament, but in a charter, I think, of the same king, King Charles II. in an earlier year of his reign, to the then Earl of Bedford (1). Besides that, there has been reference made to a modern Act of Parliament of a local and personal kind about the Newport Market (2), which shews that, whether validly or not, there was an actual grant made by James II., which has ever since been acted upon. Incidental mention has been made in the course of these proceedings of the Hungerford Market and the Stratford Market (I do not know under what circumstances they were established), and the Borough Market, all primâ facie within seven miles of the city of London.

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(1) 8 Rep. 1 a.

We are not called upon to decide, and we cannot decide, anything about those markets; but we might by a side wind be deciding most important matters affecting all of them, except so far as Acts of Parliament may have been passed for their benefit, if we pronounced that nothing whatever could be presumed to have taken place in the 356 years, which are left a blank upon this evidence, from the beginning of Edward III.'s reign to the 34th year of King Charles II., which might entirely remove all difficulty on the part of the City in the way of the creation of the Spitalfields Market.

But the matter appears to me not to stop there. The Court of Appeal have thought, and in my opinion quite rightly thought, that if the City down to the 34th of Charles II. had unimpaired and still existing the privilege which is expressed in the terms which I have read from the charter of King Edward III., there was amply sufficient ground for presuming that the City had consented to the erection of this particular market by the charter of the 34th of Charles II. And the grounds on which I think that they were perfectly right in that presumption are two. In the first place, if there be a valuable principle in our law, the observation of which within its proper limits is of cardinal importance, it is this, that all reasonable presumptions shall be made in support and not in destruction of long enjoyment and usage. It is admitted that there is direct evidence of enjoyment under this grant of the Spitalfields Market by King Charles II. from an early date in the 18th century; and that, not as shewing that it was first brought into use at that time, but of a kind from which it is legitimate to infer a still earlier use, and therefore that in point of fact the privileges which the King professed to grant have been actually enjoyed by the grantees from the date of the grant to the present day. It is, as I have said, a principle of vital importance to the maintenance of public and private rights in this country, where no law can be repealed by mere desuetude, that reasonable presumptions shall be made of all things which are reasonably possible in support of such long enjoyment. It is hardly, within reason, possible to suppose, that such an enjoyment should have been acquiesced in by the city of London, if they had been in a condition to resist and had objected to the grant at the time when it was made. The very circumstances which have been referred to in connection with the celebrated quo warranto, and with the legislative repeal after the Revolution of that judgment and everything which followed upon it, are strong to shew, that if the City were not really bound in some lawful way, as they well might be, by the grant of 34th Charles II., there would have been every probability of their resisting as encroachments upon their rights the things which were done under it; and yet they never did so.

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(1) The charter is referred to in *Prince* v. *Lewis*, 5 B. & C. 365; and recited in 9 Geo. 4, c. cxiii. (local and personal).

(2) 35 & 36 Vict. c. lxxxii.

But, in addition to that, there is another reason. A grant of this kind could not, according to the usual and proper practice, be issued without an inquiry under a writ of ad quod damnum; and this particular grant was issued after such an inquiry. It is expressly recited at the outset of it, that "by a certain inquisition taken at Hickshall in St. John Street in the county of Middlesex" (which I understand to be within the city of London) "on the 17th day of July in the 34th year of our reign, by virtue of a certain our writ of ad quod damnum lately issued out of our Chancery and annexed to the same inquisition, by the oath of good and lawful men of the county aforesaid, it was found that it will not be to the damage or prejudice of us or of others if we should" make this grant. That inquisition was made for the very purpose of ascertaining, that a grant of this nature might be lawfully made, without prejudice not only to the Crown but to any subject. This inquisition was executed within the city of London, and (as it has been admitted) before the sheriffs of London and Middlesex. I cannot conceive that such a thing as this ought to be presumed to have passed in secret, so that no knowledge of what was going on should come to the ears of anybody who was interested, the very object and purpose of the proceeding being that the Crown should not be induced to make a grant of this kind in derogation of existing interests. The presumption therefore is exceedingly strong, that it was not unknown to the city of London, was not objected to by them, and was done in substance with their assent.

It was contended that the case of *Alcock* v. *Cooke* (1) and the *Case of Monopolies* (2) shewed that there was a universal and general right of all persons to take objections of this kind, although the persons directly interested, in derogation of whose rights the grant is supposed to have been made, might not take the objections. It is obvious, at all events, that they could only take them if the persons whose rights were derogated from could also have done so. That is as plain as possible; and what I have already said tends to shew, that the presumption is, that in such a state of facts those persons could not take them. I do not think that under those circumstances I ought to dwell or need dwell long on any observations as to the principles of those cases. The *Case of Monopolies* (2) has obviously no bearing upon any particular privilege granted to a body like the city of London. It relates to the general rights and liberties of the subjects at large, which can only be encroached upon by the grants of the Crown so far as those grants are made within the proper limits of the royal prerogative, as defined, since the time when it was passed, by the Statute of Monopolies. With regard to *Alcock* v. *Cooke* (1), it is a case which may be perfectly correct in the principles which it lays down; but it is a very singular fact, that, if there ever was a case in which the Court went out of its way to lay down principles which were not needful for the decision of the particular matter before it, it was that case of *Alcock* v. *Cooke* (1); because there the question was whether wreck could be claimed by the owner of a property called Sutton, which was alleged to be part of a manor named Greetham, which manor was within property of the Duchy of Lancaster. Wreck was not mentioned in the grant, and the Court, upon looking at Domesday Book, are stated in the report, page 346, to have been of opinion that Sutton was not within the manor. One would have thought that the whole foundation of the case would then have disappeared—nevertheless the Court went on to express its opinion, as to what the state of the case would have been if wreck had been granted by this grant under which the party claimed; and it said that inasmuch as it was clearly proved that at the date of the grant wreck was outstanding, so to say, leased as belonging to a larger property to another person who was in possession under the lease, which was for a term of years, such a grant of what was not at the time in the possession of the Crown would have been void. Well, I am not at all concerned to enter upon the question whether that was so or not. I only observe that that has no bearing upon the present case.

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(1) 5 Bing. 340.

(2) 11 Rep. 84 b.

In the case mentioned at the bar of *Gledstanes* v. *Earl of Sandwich* (2), the Court took pains to classify those cases in which it appeared that the King's grant had been held to be avoided by reason of any misdescription or mistake therein, and they were referred to three classes,—one where the King professed to give a greater estate than he had himself in the subject matter of the grant—that can have no application here, for the King had no estate in the subject matter of the grant and did not profess by the charter of Edward III. to give one; the second where the King had already granted the same estate, upon which the case of *Alcock* v. *Cooke* (1) was referred to—the same observation applies here—the King has granted no estate, there is at the most a promise not to make a grant; the third where the King had been deceived in the consideration expressed in the grant. It is manifest that the present case falls within none of those classes, apart from the presumption that all the necessary consents had

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(1) 5 Bing. 340.

(2) 4 Man. &. G. 995, 1028.

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been given; and when you consider the nature of this procedure of ad quod damnum, and that a grant of this kind is not a nuisance in the sense of a public nuisance, but only that any one who was injured by it might have an assize of nusans if he has a franchise of his own which is interfered with, or if in any other way it is an injury to him, it is perfectly manifest that the principles of the three classes of cases referred to in *Gledstanes* v. *Earl of Sandwich* (1) can have no application here. The King takes pains, by the writ of ad quod damnum, to inform himself correctly about the matter; and, in the absence of any proof that there was any fraud or concealment or mismanagement in the conduct of the inquiry under the writ of ad quod damnum, it is not to be presumed that there was any, or that the King was not correctly informed by the inquisition.

In the case of *Rex* v *Butler* (2), where there was a scire facias notwithstanding the return to the writ of ad quod damnum, the facts were these. It was averred on the part of the plaintiff in scire facias, that there had been a mismanagement of the inquiry under the writ of ad quod damnum, which was a fraud upon the Crown,—that there had been a fraudulent and deceitful concealment; and that was, for the purpose of the case, admitted by the demurrer; and it was held that on that account the inquisition ad quod damnum did not prevent the Crown from repealing the letters patent. But in the absence of any averment or any allegation or any proof of that kind, it is not to be presumed that the Crown was deceived when it took the usual and proper mode of inquiry before the grant was made.

Well, I have no more to say upon that branch of the case. I will now shortly refer to the other points which have been raised. I may lay aside, I think, entirely the question upon the Paving Acts, it was hardly insisted upon in a way intelligible to me, and I do not think therefore that it requires particular attention. Certain things which in the absence of market rights might be nuisances in public streets were treated as nuisances which the local authority might abate in those Acts of Parliament; but not a word was said about the market, not a word from which it could be inferred that it was meant to repeal market rights or to

(1) 4 Man. & G. 995.

(2) 3 Lev. 220.

treat as nuisances things which could be justified as market rights. And what was said in the Irish case which has been referred to of *Corporation of Cork* v. *Shinkwin* (1) upon a somewhat different point, seems to me to be to the purpose upon this point. The objection there was made, that there were certain days on which no markets could by law be held, and that that was in the way of the right claimed. The answer which was made to that by the Court was this, "that the prohibition does not affect the prescriptive or charter rights of those entitled to markets, however vendors may make themselves liable to penalties or punishments for exercising their trades upon prohibited days." That lies entirely outside the present controversy. If anything has been done which ought not to be done under the Paving Acts, the question can be raised in the proper manner by the proper authority; but it cannot possibly give the right to anybody else to encroach upon the franchise of the market granted by the charter of Charles II. to the predecessor in title of the present plaintiffs.

Then comes the argument which has been so much pressed before your Lordships, upon the subject of there being an insufficiency of accommodation for the public in Spitalfields Market. And, as I understood Mr. Hemming in his able and ingenious argument, he put it in this way, that there is enough to shew that Spitalfields Market is so occupied and so used that, if more people than actually come into it wished to do so, they would find difficulties in the way; therefore it is to be presumed that the people who go to the defendants' depôt at Bishopsgate are all persons who would have a good defence to any action brought against them if they were to go and (I will call it) hold a market in the neighbourhood of Spitalfields Market; and as each of the tenants of the railway company who are the defendants might under those circumstances have a good defence to an action for disturbing this Spitalfields Market, if they were to do so in some other way, therefore the railway company may do what they are now doing.

I cannot help thinking that the argument is baseless both in fact and in law. It is baseless in fact, because the evidence, as I read it in this case, amounts at the most to this: that Spitalfields Market is a crowded market held in the central market square, in the streets which branch out of it, north, south, east and west, and upon the sides adjoining to them of the streets which surround the block in which they are situated; that it is a crowded market, more so at some times of the year than at others, more so on some days, Saturdays particularly, than on other days, and that at those times, if people who do not come did want to come, they might possibly find some difficulty in getting in. Then it is suggested, that the knowledge of that state of things prevents people from wanting to come or proposing to come who otherwise possibly might come, and it is also said that the stalls and standing room are let out. That does not, as I understand it, mean, that the whole space is so occupied by stalls as to prevent access to the stalls themselves. I can only say as to that, that it is a new proposition to me that the fact of a market being very much frequented, very popular, very useful, very full, is any primâ facie evidence of misconduct on the part of those who hold the market; or that it is necessarily to be presumed that other people who want to come to that market are prevented in fact from doing so by the knowledge that if they come they will probably find it full. No evidence has been given of any persons applying for accommodation in that market, and being persistently or habitually refused. I am not sure that it would be going too far to say, that no evidence has been given of any single occasion upon which any person wanting accommodation in that market has been obliged to go away or to stand outside and sell his goods, as was done in *Prince* v. *Lewis* (1), elsewhere, because he could not get in. Therefore, the case seems to me to fail entirely upon the point of fact. Further than that, so far as relates to the tenants of the defendants, there is evidence that some at least of them are in the opposite condition; not only are they not excluded from the Spitalfields Market by reason of its being full, but they actually have found and have accommodation in that market; some of them have taken stalls, as to which they

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(1) Smith & B. 395, 399.

(1) 5 B. & C. 363.

express a doubt whether they will or will not retain them if the defendants are allowed to go on.

With regard to the law, I entirely agree in the principles which I find very ably, and not the less so, because concisely, expounded in the Irish case of *Corporation of Cork* v. *Shinkwin* (1), where it is said that although the quantum of damages might be affected by shewing that there is insufficiency of accommodation in a market, yet that cannot possibly be an answer justifying an infringement of the market right. But I do not dwell in detail upon that; because no case has been referred to which really seems to me to give the least countenance to the opposite doctrine; and the opinions delivered by the learned judges to this House in the *Islington Market Case* (2) are, as I read them, expressly to the contrary. This very question was put to them, and they say, "An obligation is cast upon the grantee of a market by his acceptance of the grant, to provide convenient accommodation for all who are ready to buy and sell in the public market. If he does not do so, or if, after having once appropriated a particular site for the use of the public as a market place, he afterwards employs or permits it or part of it to be employed for other purposes without providing as convenient a place for the public to buy and sell in elsewhere within the limits of his grant, the consequence would be" What? "First that there would be a good defence to an action brought by the grantee of the franchise against any person for selling out of the market to the prejudice of his right, provided such person had been prevented from selling in the market by the want of convenient room;" (referring to *Prince* v. *Lewis* (3)). Now of course I take that as including the case of *Prince* v. *Lewis* (3), which was, that though on the particular day room might possibly have been found, yet the general state of the market known to the party was such, that he was on the particular day reasonably under the belief that he could not find his way into it. We have not to deal with that case. We have here no action brought against any such person. We have no action brought against any person who has attempted to sell in the market—still less against any person who has been prevented from selling in the market by the want of convenient room, or had reasonable ground at the time of the alleged infringement to believe that he was so prevented. That is the first consequence. "A second consequence would be that this breach of a public duty on the part of the grantee of the franchise might, unless those inconveniencies were removed and a sufficient space restored for the accommodation of the public, operate as a forfeiture and furnish a ground for a scire facias to repeal the patent by which the market was granted." We have nothing to do with that. There is no question of a scire facias in this case. "And thirdly we are not prepared to say that such misconduct of the grantee would not render him liable to an indictment for a misdemeanor." We have nothing to do with that question. Then the learned judges proceeded thus: "But these are the only consequences of the breach of duty committed by the grantee of the franchise; for we are of opinion that whilst the grant remains unrepealed, the default of providing proper accommodation for the public cannot operate in point of law as a ground for granting a new charter to another to hold a market within the common law distance, which shall really be injurious to the existing market."

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(1) Smith & B. 395.

(2) 3 Cl. & F. 513, 518.

(3) 5 B. & C. 363.

That appears to me to shew very plainly what the opinion of those learned judges would have been upon the present argument; namely, in the first place, that the want of sufficient accommodation is no forfeiture ipso facto; that without a scire facias the grant remains unrepealed and carries with it the rights of a grant, and that nothing injurious to the franchise granted may be done. If not by the Crown, how can it possibly be contended that it may be done by private persons, who have not to justify themselves for selling elsewhere because they have tried to sell in the market and have been prevented from doing so, but are deliberately invading the market right?

I have only to consider, and I will do it very shortly, because the case seems to me to be extremely clear, whether that which the defendants are doing is or is not a violation of the market rights. It is done within a quarter of a mile, or apparently about 300 yards from the Spitalfields Market; it is done by this railway company, who have laid out the whole plan in a manner which is shewn by the exhibit annexed to the pleadings after page 81. They say themselves in the evidence that the whole thing is part of their railway. Mr. Birt in his evidence at page 170 thus describes it:—"The depôt is really part of the railway, and has been utilised for the purpose of receiving into it vegetables, potatoes, fruit and general farm produce coming to it by rail." They have reserved to themselves the whole of the accesses; they have provided convenient accesses by covered roadways and sidings on their own ground with a range of space on each side of the covered roadway for the sale and, so far as is necessarily incidental to sale, for the storage of fish, vegetables and fruit—the things which are sold in the Spitalfields Market. There is a series of covered stalls or places in the nature of fixed stalls which they let out to individual salesmen nominally, and in one sense it is true, from year to year, but with the power to determine the letting at very short dates—I think within a month. The company has the general conduct and management of the whole thing—it manifestly is in their own hands. They take the greatest possible interest in it, and are most active about it; they circulate advertisements, they keep the lessees in order for the market purposes for which it has been established, and in their advertisements they shew that what they mean is a market by every variety of expression, including the word "market" itself; they shew that their purpose is to establish that which to all practical and substantial intents whatever is a market in this place—that and nothing else; and it is clear that the individuals who come there have no shops in the ordinary sense of the word; they have merely places allotted to them which they certainly would not retain if they did not use them for market purposes—places allotted to them for the sale of those descriptions of goods in accordance with and for the purposes of the general plan and scheme which the railway company have adopted. It appears to me that the facts are on all fours with those which have been held sufficient for this purpose in the case of *Pope* v. *Whalley* (1), in the case before Little V.C. of *Corporation of Manchester* v. *Peverley* (2), and in the Irish case,

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(1) 6 B. & S. 303.

(2) 22 Ch. D. 294, n.

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to which I have already referred, of *Corporation of Cork* v. *Shinkwin* (1). I think that there could not be a plainer case of the kind, and that therefore the judgment upon this point is entirely correct.

As to its being an actionable wrong to establish such a market as this without a franchise, all those cases appear to me to go to shew it, and so does the case of *Yard* v. *Ford* (2), where the setting up without lawful authority of a market upon a different day at Ashburton was held to be an encroachment on the rights of market which were granted at Newton Abbot, within seven miles. It is quite clear from that and many other authorities that such a thing as this is an actionable wrong—is a disturbance of the market if in point of fact it tends to disturb it and to injure the right. The evidence in this case satisfies me most completely that such is the case, and I agree with what one at least of the learned judges said, that if allowed to continue it will probably not only injure the value of the market, but will in a short space of time destroy it altogether.

The form of the injunction is in accordance with the general practice of the Court of Chancery, and the Chancery Division; and I think it would be dangerous to attempt too much definition in such cases, because in that way you either would be prohibiting what ought not to be prohibited, or you would be giving encouragement to colourable evasions which ought not to be encouraged. I see no reason for thinking that any variation ought in the present case to be made.

I move your Lordships that the appeal be dismissed and the judgment of the Court below affirmed.

LORD BLACKBURN :—

My Lords, I am of the same opinion. I think that if either the charter of the 34th Charles II., or the charter of the 4th James II., is a legal and valid charter, then the plaintiffs below have the rights whatever they may be (I will come to that afterwards) of the grantees of a market legally made to them. It is not contended that the Crown could not as a general rule have granted a new market by a charter at that date in the reign of

(1) Smith & B. 395.

(2) 2 Saund. 172.

Charles II., or James II. It might have granted a new charter as a general rule.

But it is said, and that is the first point I will deal with (this point was not raised before the Vice-Chancellor but it was before the Court of Appeal) that the charter-statute or statute-charter, whichever you may call it, of the 1st Edward III. was in effect an Act of Parliament rendering it illegal to grant any charter whatever from that time forward, under any circumstances, or to anyone within the broad belt bounded on the one side by the boundaries of the old city of London, and extending on the other for seven miles round; that within the whole of that space it was enacted that it should be illegal to grant a charter to anyone to erect a market. Now of course I quite agree that if the legislature have so enacted, we must give effect to it. It does not primâ facie strike one as a very likely thing to be enacted, or a very judicious thing to enact; but if they have so enacted, it will be necessary either to go to Parliament to repeal it, or else to act upon it. But I confess I am not at all satisfied upon this evidence or upon the authorities brought before us that there was an enactment at all in the reign of Edward III. upon this subject. I think there might have for all that has been shewn, but I am not at all satisfied that there was.

Charles I. and Charles II. also granted, as they had a perfect right to do, charters of inspection and confirmation to the city of London, saying that they had examined all the previous charters and that they then confirmed them and re-granted them. And amongst those they enumerated and stated this charter of Edward III. in the very terms in which we have now got it. They enumerated it as being a charter which upon the face of it begins in the form of a grant unquestionably. "The King to the Archbishops, &c., greeting: Know ye that we for the advancement of our city of London and for the good and commendable service which our beloved the mayor, aldermen, and commonalty of the aforesaid city have heretofore in manifold ways shewn unto us and our progenitors, with the assent of the prelates, earls, barons, and all the commons of our realm assembled in our present Parliament convoked at Westminster, have granted and by this our charter have confirmed." Now these are the words which upon the face of them are proper to express what the King does by his prerogative grant. And further, though he could have granted it himself by his prerogative, he recites that he does it by the advice and with the consent of the Lords of the Council, and so far it would give perhaps more solemnity to it; but it would give no additional force to it. But he also adds, "and all the Commons of our realm assembled in our present Parliament." If those words were meant to shew that, though in the form of a grant by the Crown in that way, it was done with the consent of the three branches of the legislature, the House of Commons, the House of Lords, and the King, all three uniting as an Act of Parliament,—there is no doubt that though in the form of a grant in that way it would be an Act of Parliament and have the effect of an Act of Parliament.

The authorities also shew, I think, further that whenever it appears that a thing has been done in that way, and when it appears that by usage of the time, it being an early time, by contemporaneous usage or following usage things could have been done under that form of grant which could not validly and properly be done unless it was an Act of Parliament,—that is to say unless there was the assent of the three estates in that way,—then, notwithstanding that it has not been entered on the Rolls of Parliament which would be the regular way, and which would shew beyond a doubt that it was an Act of Parliament, yet when there is this contemporaneous usage that is sufficient. That was the *Prince's Case* (1). It is very true that in the *Prince's Case* (1) Lord Coke gives a great many reasons, some of which, if I may say so with proper respect to such a great man, seem to me very childish reasons, for saying that a grant to the Earl of Chester, then a baby in his cradle, must necessarily have been an Act of Parliament; but he proceeds afterwards to very much stronger and better grounds when he points out that within a very few years afterwards there had repeatedly been decisions given and acts done by the judges quite contemporaneous with it, and the lands were gone and rights of parties interfered with, and I think subsequent Acts of Parliament referred to it, of all which things there is a total absence here.

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(1) 8 Rep. 1 a.

There was another case referred to, but I do not think it comes to very much, in Sir William Jones (1). It appears that when the Earl of Oxford died, some of the judges were asked to advise the House on a matter which had been referred to it by the Crown as to the office of Great Chamberlain, which was held by the Earl of Oxford in fee—whether that went to the heir or went so that the Crown could determine it; and it was held that it did go in fee. Accordingly it is held to this day by Lady Willoughby in consequence of that decision. But as to the Earldom of Oxford, there was a question whether that went in fee, in which case I suppose it would have gone into abeyance and the Crown would have determined that abeyance in favour of Lady Willoughby if it pleased; but it need not have done so. There was a question whether the earldom went in fee; and that depended upon a thing somewhat similar to this—a grant of the Crown in presence of Parliament revoking the attainder of the Earl of Oxford and Duke of Ireland who was dead without issue. The grant of the earldom to the Earl of Oxford was a grant which the Crown by its prerogative could no doubt make. But the former grant of the earldom had been to the Earl of Oxford and his heirs in fee; and the new earldom that was granted by this charter or letters patent of the Crown in the presence of Parliament was to the Earl of Oxford and his heirs male. The question was what that meant. If the insertion of the word "male" was merely a thing which without an Act of Parliament would be idle, and it would be a grant in fee, as would be the case if it had been a grant of lands, then Lady Willoughby's case was made out. But there was another way of putting it, namely, to heirs male of the body. There might be an Act of Parliament to make a peculiar and anomalous tenure which, except in the case of something done by Act of Parliament, would be unknown to the law of England—the heirs male going back to the grandfather's son in preference to the father's daughter—that would have been by Act of Parliament a good title to make the Earldom of Oxford go in fee. But it was shewn and proved to be contemporaneus usus—and that is what the Chief Justice mainly relies upon—that immediately after that, I think two or three times when the Earldom of Oxford would otherwise have fallen into abeyance amongst the heirs female, the heir male of the first grantee, who was not a son of the last Earl, took the earldom, and it descended in that way; and accordingly the decision was that the Earl of Oxford held the earldom to him and the heirs male of the first Earl of Oxford—in Richard II.'s time at all events. Accordingly when the heirs male of the Earl of Oxford died out in the reign of Charles II., and the Duke of St. Albans married his only daughter and heiress, there never was any attempt to make the Duke of St. Albans Earl of Oxford; that never has been dreamt of: the Earldom of Oxford has died out. Every one agrees with that.

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(1) *Earl of Oxford's Case*, Sir W. Jon. 101.

Now upon that, there being no such contemporaneus usus in this case, the question comes to be whether it necessarily would be a grant with the authority of Parliament; and I am inclined to doubt it very much. In the 4th Coke's Institute there is a full account of how the earlier Parliaments proceeded, and a very peculiar thing is stated, which I rather think exists to this day, namely, that petitions were received by Parliament then for all manner of things: and there was an early form adopted—I think as early as the reign of Edward I. (I do not remember exactly and it is not material)—of appointing triers of petitions in order that they might examine the petitions and recommend to the King and Parliament what it was wise and proper they should do with those petitions; and (this shews the antiquity) the triers were appointed not only for England but there were triers also of the petitions from Scotland. That might be good enough in the reign of Edward I., but in the reign of Edward III. I suspect the trying of petitions from Scotland would have amounted to very little. There were triers of petitions from Normandy and Guienne. In Edward III.'s time that might hold well enough, but at all events when you come down to Queen Elizabeth's time the triers of petitions from Normandy, Gascony, or other parts of France would have had very little to do. I am not sure whether it is not continued to this day, but it certainly was continued down to the time of the union with Scotland, and possibly later, that triers of petitions from Gascony and France and from Scotland, and all these places where the Crown had what was then a nominal title but no more, were always appointed at the beginning of a Parliament. I am not at all sure that they are not appointed still, but that I will not say.

Now what Lord Coke says upon that is, that those triers told them which were proper to be Acts of Parliament and which were not; and when there was a regular roll of Parliament made there were entered upon it those which were regular Acts of Parliament and they were published as statutes. And the same seems to have been done with the statute roll. The regular Parliament roll shews that there were triers of petitions, and there were petitions to which answers were made in Parliament though they might not be Acts of Parliament. And I cannot help observing that what would really come to be the state of the case as to this grant of Edward III. would be this: there was a petition in Parliament by the mayor and commonalty requiring that their old liberties should be confirmed, and the answer by the triers was: "Let the King do it by his prerogative power, and in order to give it more honour, if you like, let it be said that it was done with the knowledge of the prelates, barons and so on;" but it was not done by having the consent of the three estates of Parliament, the House of Commons and the House of Lords as well as the King. That would only be a primâ facie guess, and I quite agree that a very little contemporaneous usage, if such had existed, would have shewn that this although in the form of a grant by the King really operated as an Act of Parliament. Even without such contemporaneous usage, the entry being made formally on the face of the charter that it was done with the assent of the King, Lords, and Commons, and it being stated at the end "by the King himself and the whole council of Parliament," I am not at all sure that it may not be treated as equivalent to saying that this is a grant of the King confirmed by Parliament, and that it is to have the full authority of a grant by the King confirmed by Parliament. Whether it is necessary to go further or not, I am willing to go thus far; I think that if it was a grant by the Crown confirmed by Parliament you must construe it as being what the King's grant could be understood to mean, and the King could grant to the citizens a confirmation of all their former liberties, which

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were very numerous, and it may be that one of those liberties was that the whole city should be a market—that they might hold free market in it. If that was so, then this would follow, even although it had not been expressed, that the Crown could not grant a charter of market within a reasonable distance, which seems to have been thought at one time to be seven "leucas"—at all events could not within some distance, whatever it was, grant a fresh charter ad nocendum of the charter previously granted to the citizens. If that was so then this charter does express that. It says expressly, we will not grant a charter of market to any one within seven miles round the city. But that would be a privilege granted to the citizens, for I see no distinction between the citizens and the mayor, aldermen, and citizens—that would be a grant to the City in respect of the City's rights of market in their own district, and it would be a grant to them for their benefit and their benefit only.

Certainly, nothing whatever has been done since which is in the least degree inconsistent with that view of the matter; and there is a great deal which has been done since that is inconsistent with any other view of the matter. For to take nothing else, there was a grant by Charles II. to the Earl of Bedford of Covent Garden Market. If there was a general Act of Parliament then existing, which provided that no market should be granted to any one within seven miles round the boundaries of the city, that was a most grievous breach of that statute. It was granted at a time when the City and the Whig party were dominant in the councils of Charles II. It was granted to an Earl of Bedford, who, as is well known, was, or at least his son William Lord Russell was, at the head of that party; but that is no reason at all why the grant should not have been made if what was done by Edward III. was not a general Act. The grant of Covent Garden Market has been treated by everyone as being a valid grant to the Earl of Bedford, which is quite inconsistent with the charter of Edward III. being a general Act, although it is perfectly consistent with its being a charter or grant by the King—even confirmed by Parliament—that there should be no market granted ad nocendum of the City.

Now is there anything to say, if that was the state of things,

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that the charter of Charles was either avoided by the subsequent legislation of William and Mary (1), or was void in itself? I think not. There was a writ of ad quod damnum and a return to that writ, but there was nothing to say or to suggest that there was no such right, and the inquiry was held before the sheriffs of Middlesex and in Hicks Hall, where the sheriffs of Middlesex did assemble, and before jurors. To say that it was not notorious seems to me a very violent assumption without any fact to justify it. But that there was a return to the writ ad quod damnum, and that the Crown then granted the first charter, the charter of Charles II., seems clear. The second charter, the charter of James II., was, after the judgment in the quo warranto had been given. I think it is very possible there might be ground for doubting whether in that case the writ ad quod damnum at that time, when the sheriffs, instead of being appointed by the citizens as they used to be, were appointed de facto by the Crown, and when the citizens were, I suppose, a good deal under terror of coercion, was properly and fairly executed. When there came the Revolution the other party, the party hostile to James, had got the upper hand, and the citizens of London were in full power, but they did not dream of enacting that all markets within seven miles round the city of London, including the Earl of Bedford's, should be put an end to. What they did was this: they said that such grants as were made by Charles II. or James II. after the judgment in the quo warranto, and infringed the liberties of the City, were to be void; the reason being obvious, that they thought (and probably enough) that those which were made after that time, might not be fairly and properly made; and accordingly all charters of James which infringed the liberties of the City were to be void. I do not inquire at present whether this charter of James was one which, according to the view I have been expressing, could properly be said to infringe the liberties of the City, and so could be avoided. That may or may not be. It is utterly immaterial for the merits of the case. The defendants are not a bit the better off if the charter of James is gone, as long as the charter of Charles II.

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(1) 2 Wm. & Mary, sess. 1, c. 8.

stands,—that part of the judgment of the Court below which says that the charter of James has been avoided is not appealed against; so that I think this House has nothing to do with the question whether the charter of James is avoided or not. The charter of Charles II. is not avoided, and the charter of Charles II., as it seems to me, primâ facie stands good, and has been acted upon down to the present time by the grantees; for although there was an attempt made to argue that somehow or other the Paving Acts in that parish did shew that these charters had not been exercised in some way that I did not quite understand, or could not be exercised, there is no dispute that there is ample evidence to shew that from the time of Charles II. down to the present day, a market has been there exercised by those who represent the original grantees of Charles II.

Having disposed of that preliminary question, then comes the question whether or not, if the charter of Charles II. was good and did give them a grant of the market, the plaintiffs, who hold that grant of market, are in a position to maintain their action against the defendants for an infringement or a disturbance of the rights under that grant. Upon that, I cannot but feel that it is a very plain case as it strikes me. The franchise of a market implies in it that the lord of that market shall not be disturbed by any one meddling with it. Upon that there is a series of decisions which I think are not questioned at all.

I will go no further back than *Yard* v. *Ford* (1). There a motion was made in arrest of judgment, and what appears in the declaration there is this. The plaintiff declared "that he was seised in his demesne as of fee of a certain ancient market" (a grant had been made of an ancient market) "to be holden within the said town every Wednesday in every week as of fee and right, and that the plaintiff had, and ought to have, the said market within the said town for all goods and merchandises, then and there bought and sold, together with toll, stallage, piccage, and all other profits, advantages, and emoluments whatsoever incident, belonging, or appertaining to the said market; yet the said defendant contriving and intending, &c.,

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(1) 2 Saund. 172.

on the said 20th day of October, in the fifteenth year aforesaid, without any lawful warrant or authority, at the parish of Ashburton, in the county aforesaid, to wit within the town of Ashburton there, near adjoining to the said town of Newton Abbot, that is to say within seven miles of the said town of Newton Abbot, levied a certain new market held every Tuesday in every week throughout the year, and continued the market so newly levied from the said 20th of October in the fifteenth year aforesaid until the day of exhibiting the plaintiff's bill, whereby a great quantity of yarn and of other goods and merchandises was during all the time aforesaid sold in the said market so newly erected, which otherwise would have been brought to the said market of the plaintiff holden during all the time aforesaid every Wednesday in every week of the year to be there sold, to the great damage of the said plaintiff, and the great nusance of the said market of the plaintiff, and by reason thereof he, the said plaintiff, has lost and been deprived of the toll," and so forth. "Not guilty" was pleaded; a verdict was found for the plaintiff and damages were assessed. Then a motion was made in arrest of judgment. It is to be observed that there is not one word said there in the declaration to the effect that the lord of the market whose name was Yard (an ancestor I suppose of Sir John Yarde Buller) had kept open a sufficient market or given sufficient accommodation, or anything of the kind. There is nothing whatever said to the effect that the defendant who had set up the new market and in that market professed to levy tollage or piccage, or to exercise any other of the privileges of the Crown so as to make himself liable to a quo warranto, could not get sufficient accommodation in the existing market. It is put entirely upon this, that having a good market to be held on Wednesday, the defendant had started a new market to be held on Tuesday within a short distance, so short a distance that he did disturb the former market; and the decision was that that was good,—that although it was not held upon the same day, Wednesday, yet it was a matter of evidence to shew that it did disturb the market; and it being proved that it did disturb the market there was good ground of action without any averment, and without entering into the question as to whether at Newton Abbot there was or was not sufficient market accommodation for the public.

This was followed by *Moseley* v. *Chadwick* (1), I prefer to refer to the report in Douglas for that case, because the very points that were taken appear there. In that case there were counts against the party for selling similar to those which occurred afterwards in the case reported in 5 Barnewall and Cresswell. The plaintiff was possessed of a market, and the defendant for the purpose of selling divers goods set up a market and caused and permitted great quantities of goods to be sold in it. There were counts in which there was no averment that the plaintiff had provided sufficient stalls; there were others in which it was stated he had provided stalls, and that the defendant ought to have sold in those stalls. Then Lord Mansfield said, "The great question is whether an action will lie by the owner of a market against another who takes the profit of his own soil by the erection of stalls, without usurping any franchise upon the Crown. We are all of opinion that we are bound by the authorities to say that this is an inquiry for which an action may be maintained. The authorities are the *Prior of Dunstable's Case*; Br. Abr. Prescription, 98; 2 Rol. Abr. Market, pl. 1 and 2; Britton, 169, c. 63; *Yard* v. *Ford* (2), which latter case is almost in point, and on which we lay great stress. There was no allegation in that case that the defendant took toll, or had a court of piepoudre, or did anything that would be an usurpation of the franchise. Upon these authorities, and upon that of *R.* v. *Marsden* (3), we are all of opinion that there must be judgment for the plaintiff."

Now could these two cases, *Yard* v. *Ford* (2) and *Moseley* v. *Chadwick* (1), possibly be good law unless the person who had the franchise could maintain an action against one who set up a rival market so as to injure him, which was a matter of evidence, though it was not on the same day, provided it was within such a distance that it might injure him; the question whether it did actually injure him or not being a matter of fact? Lord Mansfield expressly says, what I think the report in Williams's

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(1) 3 Doug. 117; 7 B. & C. 47, n.

(2) 2 Saund. 172.

(3) 3 Burr. 1812.

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Saunders implies, that the judges had before said that it was not essential for its being a disturbance of a market that there should be any of those infringements upon the Crown.

Then following that in order of date, comes the Irish case of the *Corporation of Cork* v. *Shinkwin* (1), and there again the way in which the case arose was a little peculiar. The parties had brought the case to trial as to whether the market was good or no in order to raise the question, and they had apparently arranged how the matter should be taken, and the learned judge who tried it, a judge of considerable eminence, Burton J., stated what points were reserved for the Court, and then told the jury that it was pretty plain what the questions of law were, and directed them that the corporation of Cork had established their title. The jury seem, for what reason I do not know, to have taken the bit in their teeth, and they would not find it. Then upon the question of sending it down for a new trial the Court took into consideration what were the real questions, and what would have been the questions reserved if the jury had not taken the bit into their teeth, and they expressed their opinion, and a very good and able opinion it is. Amongst other things they distinctly say in the first place that they had no doubt at all that what was done by Shinkwin was setting up a rival market; and singularly enough what they said was done is so very like what is done here that Bacon V.C., after hearing the argument in this case as to whether it was a market or not, might have taken a good deal of the judgment in the Irish case and have said, "This will do very well for the judgment in the present case;" and he might have read out the very words of that judgment. I think there can be no question that there was ample evidence in the present case to justify the Court of Chancery in saying that what the Great Eastern Railway Company were seeking to do was to set up a rival market and that that would be a disturbance of the franchise of the plaintiffs.

Then an attempt was made to say that *Prince* v. *Lewis* (2) shews that it is an essential thing in order to maintain any action for disturbance of a market that you should shew that the lord has kept the market in a good state, and that people might come into it. The point actually raised in *Prince* v. *Lewis* (1) was whether there was a disturbance of the market, not by setting up a rival market, but by selling goods near it; whether it was not a good excuse for the party to say, "I have not disturbed you at all, for my only disturbance was that I sold near the market, instead of coming into the market to sell, and as you did not leave room for me to come in I am excused, I must sell outside." On principle I think unquestionably that would be a perfectly clear defence. Mr. Charles pointed out in his argument that a good deal of what Lord Tenterden says does point as if he had thought it was an essential averment before you could maintain any action for disturbance of a market at all, that you kept the market open in such a way that persons might enter into it. If he did mean to say so I can only say that that is very contrary to what the Irish Court had said just two years before; it is very contrary to what is said in *Yard* v. *Ford* (2); it is very contrary to what seems from Douglas to have been the very point decided by Lord Mansfield in *Moseley* v. *Chadwick* (3), and what is more, to my mind it seems to me to be very contrary to principle and to be without authority.

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(1) Smith & B. 395.

(2) 5 B. & C. 363.

Then we have afterwards the case of *Mosley* v. *Walker* (4) in which the plaintiff recovered. It is noticeable rather, I think, that Parke B. (Lord Wensleydale) was one of the counsel in the case, if I am not mistaken, and therefore he knew perfectly well all that was decided then and everything about it; he had worked the case up, I have no doubt, very well; and when the House of Lords afterwards asked the questions about Islington Market (I need not proceed to read it) it is stated, in the note to Meeson and Welsby, that an account of what took place was furnished straight to the reporter by Parke B. (5). That is therefore a very authentic account of what took place, and it agrees very much with the report in 3 Clark and Finnelly. I dare say Clark and Finnelly got the same information, but however that may be,

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(1) 5 B. & C. 363.

(2) 2 Saund. 172.

(3) 3 Doug. 117; 7 B. & C. 47, n.

(4) 7 B. & C. 40.

(5) 12 M. & W. 20, n.; 3 Cl. & F. 513.

I need not repeat what the Lord Chancellor has already said at considerable length. If you read carefully what Littledale J., giving the opinion of himself and Parke B., says, it is impossible not to perceive that they did not consider that in *Prince* v. *Lewis* (1) the fact that the plaintiff did not maintain the market in good and sufficient order was a bar to an action such as this for disturbing the market, or even to an action against an individual for disturbance; but only that if it was the fact that it did prevent a person from using the market, that might disprove the allegation that he had disturbed the market by selling as he did, inasmuch as he could not have sold in the market but was prevented from doing so. That is what they pointedly say, and that I think no one would quarrel with.

But that is not the point which we have now to consider. What we have now to consider is whether or not the Court below have been correct in saying first of all that what was done by the Great Eastern Company was a setting up of a rival market. Upon that, which is a question of mixed fact and law, I cannot, as I have already stated, bring myself to entertain any doubts. Enough has been pointed out to shew that from the evidence there cannot be much doubt that it was a rival market. Secondly, that if there was a want of sufficient accommodation in those parts which are marked blue on the plan that was no bar to maintaining an action, and would give no right to the Crown without a scire facias to grant a new charter to another person and would give no right to another person to start a new market. I need not go further than that. Whether or no that new market would be advantageous to the public or not is not a question that a Court of law could entertain. The defendants can if they please appeal to Parliament to have an Act granted to enable them to do it, and if they shew, as very likely they may shew, that it would be highly to the public advantage that they should be permitted to sell there, whether there are private rights in other markets in the neighbourhood or not, and that the private rights of these other markets must give way to the public benefit, they will get their Act; but, according to the usual custom, they will get it on the terms of making such compensation as would be reasonable and proper. What is now sought here is to do it without giving any compensation at all, and that I confess I should not feel inclined to favour, if it were a question of favour, but it is not a question of favour. If the plaintiffs have established, as I think they have, that they have a right which is disturbed by what the defendants are doing, they have a right to an injunction to prevent the defendants doing it.

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(1) 5 B. & C. 363.

As to the form of the injunction, I agree with what the Lord Chancellor has said, and I would further add, that I have not been able to figure to myself what sort of thing could be bonâ fide done by the Great Eastern Railway Company with this land, unless they intend setting up a rival market which would fall within the terms of the injunction as at present drawn. I quite agree in the judgment proposed.

LORD FITZGERALD:—

My Lords, I concur in the judgment which has been proposed. It occurred to me all through the discussion that the only question in the cause was the legal validity of the charter of Charles II. which was impeached as being in contravention of that special provision in the statute-charter of Edward III. which has been so much dwelt upon.

I concur in opinion with the Lord Chancellor that the charter of Edward III., though not to be found on the statute roll, was granted by the Crown with the full assent of Parliament, and has the full effect and operation of a private Act of Parliament. The form of the instrument, its language, differing so essentially from an ordinary grant from the Crown, and its conclusion, all point to its true character being that of an Act of Parliament and not a mere charter. It would be difficult to suppose that the parties to be interested under it would have been satisfied with anything short of a parliamentary grant, or that the nobles, who then had the King as well as the Parliament in their hands, would have incurred the risk of permitting a King aged fourteen, whose title was at least questionable, as his father was then still living, to make so extensive a grant without the authority of Parliament. The King's age was then fourteen. That, it is true, would not affect the validity of the charter, as it was an act of the King as a body politic, but it might greatly increase the responsibility of his ministers; and in three instances which we have before us of charters, one being the Prince's Charter, all occurring within a not very great length of time of each other, it is curious to observe that none of the three appears upon the statute roll. That only shews that there were Acts of Parliament at that period, recognised as Acts of Parliament, which do not appear at all upon the statute roll.

It is also to be borne in mind that the charter of Edward III. seems to embrace matters which were not within the prerogative of the Crown, and which required confirmation by Parliament. Assuming, then, that the charter of Edward III. was so fully confirmed by Parliament as to give it the character and effect of a statute, we have yet to consider what is the true construction of the provision, "And that no market within seven miles round about the aforesaid city shall be granted by us or our heirs to any one." It was intended for the benefit and protection of the corporation of the city of London. The Court of Appeal seem to have come to their decision on the ground that this was a benefit which the corporation might waive, according to the legal maxim which the Lord Chancellor has already cited, "Quilibet potest renunciare juri pro se introducto." I say nothing on this, as it may be doubtful whether rights so large, and in which the public at large may have had so considerable an interest, could be given up or waived without the authority of Parliament; and I prefer resting my judgment on the construction of the provision itself. It seems to me that it was not intended that there should be a hard and unyielding provision that the prerogative of the Crown was to be parted with for all time, and that the true construction of this charter is that no market should be granted to any one within the prescribed limit to the prejudice of the corporation.

I quite agree that we ought now to presume the assent of the corporation to the charter of Charles II. It was preceded by an inquiry, under a writ of ad quod damnum, held within the

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limits of the City by the City sheriffs and ending in a verdict or decision that the proposed grant of this market to be held outside the limits of the City would not be prejudicial to any one. The corporation of London never have questioned, and do not now question, the right of the parties claiming under the charter of Charles II. I have no doubt that notwithstanding the statute-charter of Edward, the grant of Charles II. was within his prerogative and valid.

Having once arrived at this conclusion, all the rest seems to me to follow; and I will not attempt to add to what has fallen from the learned Lord Chancellor. The acts of the defendants seem to me to have been an invasion of the plaintiffs' right, from which they are entitled to protection by injunction.

I took some objection to the form of the injunction. I thought that it was rather too extensive and might cover acts—and I am still rather inclined to think that it might cover acts—which otherwise would be legal and right. But I have had no experience in Courts of Equity now during a period of over twenty years, and I yield my judgment entirely on that point to the life-long experience and sounder judgment of the Lord Chancellor.

I have arrived at the conclusion which I have stated with some, I will not say, regret, for that is a feeling which I ought not to have, but with some degree of unwillingness; because I cannot hide from myself that it would be of great advantage to the district in question, densely populated and increasing in population as that district is, that this institution of the Great Eastern Railway Company should not be closed up; and further, I am rather inclined to think that these franchises, such as market franchises, however wise and suitable they may have been three centuries ago, are unsuited to modern times and modern exigencies. But we are not here to make laws---we are not here to legislate—we are here to administer the existing laws. We are not here to interfere with or to confiscate private right—our province is to protect it. And I will only point out that if upon any of the grounds so ably and not too persistently urged by Mr. Hemming, the owners of this franchise

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have forfeited or lost their claim to it, the judgment of this House, in the present case, will not prevent any of the public from asserting that they have done so. That is to be done either by scire facias, which any one can take proceedings to obtain, to repeal a patent which was improvidently issued or has been lost by abuse, or parties may seek from the Crown a right to establish another market in the immediate vicinity: and I can well conceive that consistently with other and public interests, such a market might be established which would not be prejudicial to the owners of the franchise now before us. Again, it is open to anybody to prosecute a private Act of Parliament, and that private Act of Parliament would be based upon the equitable ground of compensation to the parties whose rights might be interfered with.

I entirely concur in the judgment of the House.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 4th July 1884.

Solicitor for appellants: *W. F. Fearn.*

Solicitors for respondents: *Waterhouse, Winterbotham, & Harrison.*

[HOUSE OF LORDS.]

H. L. (Sc.) FLEMING (PAUPER) . . . . APPELLANT;

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Notour Bankruptcy—Statutes 19 & 20 *Vict. c.* 79; 43 & 44 *Vict. c.* 34.

The Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 34), s. 6, enacts that in any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency, concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or, where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment, followed by the lapse of the days intervening prior to execution without payment having been made.

The Court of Session decerned A. to pay to B., with an execution of charge thereon indorsed, dated the 8th of June, 1883. The days of charge on the said decree expired on the 14th of June, 1883, and payment had not been then made; but on the 13th of June A. intimated to B. that he had appealed to this House against the decree, and on the 20th of June the usual order of service in the said appeal granted on the 18th of June was duly served on B.:—

Held, affirming the decision of the Court below, that there was notour bankruptcy under the statute, which could not be affected by the appeal.

Bankruptcy—Sequestration—Contingent Debt—Bankruptcy (*Scotland*) *Act*, 1856, *ss.* 14, 31.

By letters C. agreed that any advances he made to A. on I. O. U.s should not be an obligation against A. upon which he could sue A., or use diligence against him, but that they should until final adjustment of a joint adventure be retained as vouchers of the current account, "upon which I cannot sue you or use diligence for them against you." A. became notour bankrupt, and C., the petitioning creditor, in a petition for sequestration founded on the debt forming the balance of the accounts current, which he vouched by the I. O. U.s:—

Held, affirming the decision of the Court below, that the debtor having become notour bankrupt, C. was not barred by the agreement from applying for sequestration.

Per LORD WATSON:—A contingent debt within the meaning of sect. 14 of the statute of 1856 is a debt which has no existence now, but will only emerge and become due upon the occurrence of some future event.

APPEAL from the First Division of the Court of Session, Scotland.

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A. G. Fleming, manager of the Scottish Banking Company, the appellant, raised this action against the respondent, R. Yeaman, for the recall of a sequestration granted at the respondent's instance by the sheriff substitute of the county of Forfar on the 13th of October, 1883. The appellant's grounds for the recall were (1), "that he was not notour bankrupt; and (2), that the debt upon which the petitioning creditor claimed is not sufficiently vouched, or, at least, is not a debt upon which he can obtain sequestration."

The statement annexed to the respondent's petition for sequestration set forth that he was a creditor of the appellant to the extent of £1000, said to be an advance by Yeaman to Fleming, by bill drawn by Fleming on the firm of J. & W. Kinnes, indorsed in blank by him to Yeaman, and £60 13*s.* 8*d.* as interest thereon, also a debt of £1591 12*s.* 11*d.*, being the balance of a current account between Fleming and the respondent from the 21st of May, 1879, conform to thirteen holograph acknowledgments of debt or I. O. U.s granted by Fleming to the respondent and constituting the vouchers of the debit side of the account.

The condescendence further set forth that the appellant had within the last four months been rendered notour bankrupt within the meaning of the Bankruptcy (Scotland) Act, 1856, and the Debtors (Scotland) Act, 1880 (1), and then remained in a

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(1) The material parts of the provisions of the Bankruptcy (Scotland) Act, 1856, 19 & 20 Vict. c. 79, are as follows:—

"Sect. 7. Notour bankruptcy shall be constituted by the following circumstances:— . . . . 2nd, By insolvency concurring either (*a*) with a duly executed charge for payment, followed, where imprisonment is competent, by imprisonment or formal and regular apprehension of the debtor, or by his flight or absconding from diligence, or retreat to the sanctuary, or forcible defending of his person against diligence, or, where imprisonment is incompetent or impossible, by execution of arrestment of any of the debtor's effects not loosed or discharged for fifteen days, or by execution of poinding of any of his moveables, or by decree of adjudication of any part of his heritable estate for payment or in security; or (*b*) with sale of any effects belonging to the debtor under a poinding. . . . ."

"Sect. 14. Petitions for sequestration may be at the instance or with the concurrence of any one creditor whose debt amounts to not less than fifty pounds, or of any two whose debts together amount to not less than seventy pounds, or any three or more creditors whose debts together amount to not less than one hundred pounds, whether such debts are liquid or

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state of notour bankruptcy. On the 1st of October, 1883, the sheriff substitute granted the usual warrant to cite the appellant, and granted commission for the recovery of evidence of the notour bankruptcy of the appellant. On the 8th of October, at a diet of the commission, the respondent led evidence of his averments, and produced, among other documents, (1), Extract decrees of the Court of Session in a petition at the instance of the liquidators of the Pant Mawr Slate Quarry Company against the appellant, dated the 20th of March and the 16th of May, 1883, whereby the Court decerned the appellant to pay to the said liquidators £305 15*s.* 11*d.* of calls, with interest, and £46 14*s.* 2*d.* of expenses, with an execution of charge thereon indorsed, dated the 8th of June, 1883; and (2), A trust deed dated the 27th of May, 1879, whereby the appellant, after reciting that his affairs had become embarrassed, made over all the estates then belonging, or that should belong to him during the subsistence of the trust, to R. F. Hunter, solicitor, upon trust to pay the debts due to his creditors, who should accede thereto, and to pay the residue to him the appellant, with power to the trustee to apply for sequestration of the estates under the Bankruptcy Acts. It was alleged that under this trust deed the creditors had been paid

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illiquid, provided they are not contingent."

"Sect. 15. Petitions for sequestration presented without the concurrence of the debtor, he being in life, shall be competent only within four months of the date of the debtor's notour bankruptcy. . . . ."

"Sect. 31. The deliverance awarding sequestration shall not be subject to review; but any debtor whose estate has been sequestrated without his consent . . . may within forty days after the date of such deliverance present a petition to the Lord Ordinary, setting forth the grounds for recall, and praying for recall."

And the Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 34), which abolishes imprisonment for civil debt, except in certain specified cases, provides as follows:—

"Sect 6. In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or, where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment, followed by the lapse of the days intervening prior to execution without payment having been made. Nothing in this section contained shall affect the provisions of sect. 7 of the Bankruptcy (Scotland) Act, 1856."

only 1*s*. 6*d*. in the pound, and that the trust was still in existence. As to the decrees, it was shewn that the days of charge expired on the 14th of June; that payment of the sums thereby decerned for had not been then made; that a petition and appeal to this House against the said decrees was presented, and an order for the service of the appeal made on the 18th of June, 1883; that on the 13th of June, 1883, the day before the days of charge expired, the appellant's agent addressed a letter to the solicitors of the above-mentioned liquidators, stating that it was his intention to present such appeal, but that the order for service thereof was not actually served on the liquidators' solicitors until the 20th of June, 1883. The liquidators had obtained an order for interim execution of the decrees on condition that they found caution for repayment to the appellant in the event of the appeal being successful. But, by agreement, the sums decerned for by the decrees were, on the 21st of July, 1883, consigned by the appellant into bank to await the event of the appeal. Fleming, at the hearing before the sheriff-substitute, produced, inter alia, a letter signed by Yeaman to the following effect:—

The Lea, Corstorphine,
25*th May*, 1883.

Dear Sir,—Referring to the agreement betwixt you and me, dated the 9th of May, 1881, by which I agreed to advance you £1000 on certain conditions, I hereby declare that, although it is mentioned in said agreement that I had advanced you £1000 on an I. O. U., that said £1000 has been advanced, or is to be advanced, to you at various times on I. O. U.s on an open current-account betwixt you and me, and the first advance on said open current-account in connection with said loan of £1000 was made on the 28th of February, 1881, and so on thereafter from time to time.

Referring also to the £500 originally advanced by Mr. David Stewart for your furniture, and latterly by me, and for which I ultimately accepted a bill signed by your brothers, James and David Fleming, with interest thereon added, and in order to pay this advance and any balance which may be due by me on said open current-account before referred to, over and above said £1000, under the said agreement which falls to be deducted from said current-account before said balance can be declared, I hereby acknowledge having received a deposit receipt of the Scottish Banking Company, Limited, for £1000, dated the 22nd of January, 1883, and lodged for a period of five years, with interest payable at overdraft rates six-monthly—£600 of said deposit-receipt being from David Fleming in payment of said bill for furniture, and £400 from you, which £400 is in excess of any balance due to me, which can be charged against you for personal advances under said open current-account and interest due under said agreement after £1000, under said five years' agreement, has been deducted. The I. O. U.s granted or to be granted by you in connection with said current-account shall, until final adjustment by you, be retained by me as vouchers of said current-account, upon which I cannot sue you nor use diligence for them against you. In the adjustment of said account, sums fall to be credited said current-account for bills lodged with me at various times as against many of these I. O. U.s, and also other payments made by you on my behalf. Likewise in said adjustment, all advances on I. O. U.s against the High Street stance belonging to me for payment of feu-duty or otherwise, shall not be chargeable against you in said account, and are null and void. Also any advances on I. O. U.s which were made in connection with our joint adventure with J. and W. Kinnes' estates and properties shall fall to be adjusted, and shall not be included in said current-account, but shall be charged against the account for the joint adventure.

It was specially agreed betwixt us that the policy of the Standard Life Assurance Company on the life of G. B. S. Watson, referred to in said five years' agreement, should be allowed to lapse, and in lieu thereof, you have agreed to carry through another policy on his life for a like sum in your new life office as soon as you can get this done. The portion of the agreement referring to said furniture bill shall now be cancelled in consequence of said bill having been paid; and with these alterations I hereby confirm said agreement, and notwithstanding any irregularity which may have occurred in breach of said agreement, or any letters by you to me to the contrary, as to the delivery of said deposit-receipt or otherwise.

I agree to hand over to your brother David Fleming the whole bills and other documents in connection with the furniture. Yours truly,

Robert Yeaman.

John Fleming, bank clerk, Dundee, *witness.*
James Gray, joiner, Dundee, *witness.*

The sheriff granted sequestration on the ground that notour bankruptcy had been constituted.

The appellant presented a petition to the Lord Ordinary for the recall of the sequestration in accordance with sect. 31 of the Bankruptcy (Scotland) Act, 1856.

His pleas in law were—

1. The petitioner not being, and not having been, at the date of presenting the said petition for sequestration notour bankrupt, the sequestration ought to be recalled.

2. Under the agreements before referred to, the respondent having stipulated that he should not be entitled to sue or do diligence on the documents founded on in the oaths produced with the petition for sequestration, the said proceedings were inept.

3. The alleged debt deponed to in the second oath produced with said petition having been unascertained and contingent, could not form a ground for sequestration.

4. The said sequestration proceedings being unfounded in fact and in law, the sequestration ought to be recalled, with expenses.

On the 9th of November, 1883, the Lord Ordinary (1) pronounced an interlocutor dismissing the petition for recall. The appellant lodged a reclaiming note, and on the 1st of December, 1883, the First Division of the Court of Session adhered to the Lord Ordinary's decision (2).

On appeal,

1884. July 7. The appellant was heard in person.

The Lord Advocate (*Balfour*, Q.C.), and *George Law*, for the respondent, were not called upon (3).

LORD BLACKBURN:—

As I understand it there are two grounds, and two only, on which the petition for recall which has been presented here could possibly have been supported. One of them is that, inasmuch as this sequestration can only be granted where there has been a proper debt and upon notour bankruptcy by insolvency, this was not notour bankruptcy. Now as to that we have first of all the Debtors (Scotland) Act of 1880, which says in the 6th section, "In any case in which under the provisions of this Act imprison-

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(1) Lord Kinnear.

(2) 21 Scot. Law Rep. 164.

(3) The respondent in his printed case referred to the following: Effect of order of service of appeal: *Henderson*, 28th Jan., 1802, 13 F. C. C. 40, Mor. voce Appeal, app. 1.; *National Exchange Co.* v. *Drew*, 19th March, 1858 (20 Court Sess. Cas. 2nd Series, 837); *Tulloch* v. *Davidson*, 17th July, 1858 (20 Court Sess. Cas. 2nd Series, 1319); *Fleming* v. *Robertson*, 9th July, 1859 (21 Court Sess. Cas. 2nd Series, 1204); *Glasgow and Londonderry Steam Packet Co.* v. *Clyde Shipping Co.*, 19th Nov. 1859 (22 Court Sess. Cas. 2nd Series, 2).

If notour bankruptcy constituted, proceedings for bringing the decree under review cannot affect it: *Ker* v. *Scot*, 20th February, 1829 (7 Court Sess. Cas. 1st Series, 438); *Sutherland* v. *Sutherland*, 11th Feb. 1843 (5 Court Sess. Cas., 2nd Series, 544); *The National Bank of Scotland* v. *Johnston*, 29th Nov., 1842 (5 Court Sess. Cas. 2nd Series, 205).

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ment is rendered incompetent notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment." That is not this case, "or, where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made." Now that is the case at present before us—there was an extracted decree, at the instance of this Welsh Company's liquidators, for payment followed by the lapse of the days intervening prior to execution without payment having been made. After the days had expired, and when the period for payment had already expired, it is alleged that what happened was equivalent to payment; and probably, or at least possibly, if there had been actual payment, then, there being no insolvency in fact and the insolvency having ceased, that would have put an end to the notour bankruptcy; but if insolvency still existed there is nothing whatever in the wording of that statute or in the reason of the thing, as far as I can see, even supposing that all the proceedings which have taken place in this House relating to the former debt are to be regarded as absolute payment, undoing the effect of the notour bankruptcy, if there was, within the terms of this statute which I have just read, insolvency concurring.

Now was there insolvency concurring? On that point there is not only what has been observed in the Court below, that it was alleged and proved and evidence was given before the sheriff that there was insolvency, but Mr. Fleming and his advisers did not deny that there was insolvency; and in the trust disposition which he executed, he himself asserted that he was unable to pay the several debts due by him, in consequence of which he granted a trust disposition. That shews clearly that at the time when he granted that trust disposition he was insolvent in the sense that he was not able to pay 20*s.* in the pound. Nothing that has been shewn here has prevented that being the case up to 1883. If I understood it rightly, Mr. Fleming wished to get an opportunity of proving that he has since that time acquired property (I think he said from his grandfather), and that in

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consequence of having acquired that property from his grandfather he has become solvent subsequently. If he has, that would be an excellent reason why he should pay his creditors 20*s.* in the pound, and they, I dare say, would be very glad to receive it. But you cannot make that relate back and say that he was not insolvent at the time. When the sequestration was granted insolvency existed, and there has been nothing to remove it.

Then, further, there must be a debt properly vouched. It is not sufficient for Mr. Fleming to say, "That debt is a debt solvendum in futuro, but it is not solvendum now; it is not enough to allege that. Debitum in præsenti, solvendum in futuro, is good enough to support a sequestration.

But it is alleged that the effect of the rather complicated instruments which were executed between these parties was that the debt was made a contingent debt. Looking at the whole thing, as far as one can make it out, I think that there perhaps was a doubt at the time when the sequestration was made whether the amount of that debt was an ascertained amount, and it was possible that things might have happened, if the appellant had gone on solvent till the end of the five years, to diminish the amount then payable. But to say that the consequence of that was that the debt was contingent is not, I think, to put the proper meaning upon the word. The point is one which would require evidence and examination, and the sheriff has decided that it was a good debt—the Lord Ordinary has decided that it was a good debt—for this purpose the Lords of the First Division of the Court of Session have said that it was a good debt—and certainly Mr. Fleming has not succeeded in bringing forward any reason whatever why this House should say that it was not a good debt.

That being so, I think that this appeal must be dismissed, and I so move your Lordships. As the appellant sues in formâ pauperis there will be no costs.

LORD WATSON:—

The appellant in this case was sequestrated by a deliverance of the sheriff at Dundee upon the 13th of October, 1883. The

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petition for sequestration was presented on the 1st of October, and the petitioner undertook to make out these three propositions to the satisfaction of the judge: first, that the present appellant was insolvent; secondly, that he had been duly made a notour bankrupt within four months preceding the date of the petition; and in the third place, that the petitioner, the respondent in this appeal, was a creditor, in the sense of the statute, possessing a claim of debt against the appellant sufficient to sustain a petition for sequestration. The appellant was represented in the proof that was led before the sheriff in support of the petitioner's averments, and he had an opportunity then afforded him, if he had chosen to avail himself of it, to rebut the evidence produced by the petitioner upon the three points to which I have adverted.

Now, it appears to me that the evidence establishes conclusively that this gentleman, who had become insolvent in the end of the year 1879, remained insolvent on the 1st of October, 1883, when the petition for his sequestration was presented. The trust deed which he had previously executed, in favour of a trustee for creditors, and of which the inducing cause, as stated by the appellant himself, is that he was unable to pay his debts, stood unrecalled and in operation at that date. The presumption is that he was insolvent, and that must be assumed as a fact against him unless he has shewn by very clear evidence that the contrary was the fact, and that his estate was worth more than 20*s.* in the pound to his creditors. But so far from impeaching the inference which necessarily followed from the production of the trust deed, he never from first to last in these proceedings puts a statement on record, or tenders proof, to the effect that he was solvent.

Of course the appellant could not bring the sheriff's deliverance of the 13th of October under review—he has followed the only course competent to him by presenting a petition for recall of the sequestration under the 31st section of the Act of 1856; and the grounds upon which he has maintained to your Lordships that the sequestration ought to be recalled are substantially these two: first, that if he had been made a notour bankrupt, that notour bankruptcy had been done away with by certain after proceedings taken by him; and, in the second place, that the debt founded upon by the petitioner (the present respondent), and sustained as sufficient by the sheriff, is not a good debt in terms of sect. 14 of the Act of 1856. Now as to the first of these grounds, it is proved beyond all question that the appellant had been made notour bankrupt in terms of the 6th section of the Debtors (Scotland) Act of 1880. But then the creditors who had made him bankrupt were, he says, satisfied, at least their claim was satisfied, "before the 1st of October, 1883," when the petition for sequestration was presented. He was still continuing to litigate with them; because after he had been made notour bankrupt he obtained on the 20th of June, 1883, an order of service of appeal from this House, and he prosecuted that appeal, and has taken other proceedings in the course of which he has given security that whatever sum is eventually found due to these creditors at whose instance he was made bankrupt will be paid. The question is, what effect has that upon notour bankruptcy if he remains insolvent? It is not enough to prove that he has paid the debt in the interval, either with his own money or with money got from his friends. He must not only shew that he has paid the debt, but he must also shew that his insolvency has been removed. It was the very object of sect. 9 of the Act of 1856 to provide that an insolvent should not be permitted to defeat a sequestration by going and paying off his friends whilst he was unable to pay the general body of his creditors; and accordingly it enacts that whenever the requisites concur which are necessary to constitute notour bankruptcy it "shall," where there is no sequestration, "continue until insolvency cease."

Then, as to the sufficiency of the debt, I concur in the opinion which has been already expressed by my noble and learned friend on the woolsack (Lord Blackburn). The question which the sheriff had to decide was simply this, whether the petitioner had produced sufficient evidence to shew that he was a creditor of the insolvent to the requisite amount. No doubt what he did produce vouchers for is, in a sense, a claim upon an accounting; but he has vouched the debit side of the account against the insolvent, and has also admitted items per contra which destroy it to the amount of nearly half, leaving a balance of £1500. No attempt has been made to impeach that account. It has not been shewn that there is any farther debt which will go to reduce the balance. I have no doubt that if they had continued for five years to carry on various speculations in which the respondent and the insolvent appear to have been engaged, there might have been a change operated upon the account. But this is the case of a sum presently due though not presently exigible. It might have been affected by operations in future years, and it is a debt which might be enlarged by these operations. It is a debt, remaining so until it is discharged or wiped out. That is not a contingent debt; for I apprehend that a contingent debt within the meaning of sect. 14 of the statute is a debt which has no existence now but will only emerge and become due upon the occurrence of some future event.

I am clearly of opinion with your Lordship that the interlocutors appealed from ought to be affirmed and the appeal dismissed.

LORD FITZGERALD concurred.

Interlocutors appealed from affirmed, and appeal dismissed.

Lords' Journals, 7th July, 1884.

Agents for appellant: *Simson, Wakeford, Goodhart, & Medcalf, for William Officer, S.S.C. Edinburgh.*

Agent for respondent: *William Bell, for D. S. & T. Littlejohn, Dundee.*

END OF VOL. IX.

The Mode of Citation of the Volumes in the *Three Series* of the Law Reports, commencing January 1, 1884, will be as follows:—

In the First Series,
25 Ch. D.

In the Second Series,
12 Q. B. D. 9 P. D.

In the Third Series,
9 App. Cas.

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ACCORD AND SATISFACTION—*Debtor and Creditor — Contract — Consideration — Contract by Creditor to take less than Sum due.*] An agreement between judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments, the creditor will not take any proceedings on the judgment, is nudum pactum, being without consideration, and does not prevent the creditor after payment of the whole debt and costs from proceeding to enforce payment of the interest upon the judgment.—So *Held* affirming the decision of the Court of Appeal. —*Pinnel's Case* (5 Rep. 117 a) and *Cumber* v. *Wane* (1 Str. 426) followed. Foakes *v.* Beer [605

ACTION—For deceit - - - - 187
See False Representation.

ADMINISTRATION — *Jurisdiction of English Court over Scotch Assets of Testator domiciled in Scotland—Scotch Assets.*] A testator domiciled in Scotland and possessed of a large personal and some heritable property in Scotland and of a comparatively small personal property in England, by will made in Scotch form appointed several persons to be executors and trustees, some of whom resided in England and some in Scotland. The trustees obtained a confirmation of the will in Scotland, and the confirmation was sealed by the English Court of Probate under 21 & 22 Vict. c. 56. An infant legatee resident in England brought by his next friend an action here to administer the estate, and the writ was served upon some of the trustees in England, and (under an order) upon the Scotch trustees in Scotland. The trustees appeared without protest and took no steps to discharge the order, but obtained an order of reference to inquire whether the further prosecution of the action would be for the benefit of the infant plaintiff; upon which an order (not appealed from) was made for the further prosecution of the action. The trustees removed all the English personalty into Scotland before the action came on for trial:—*Held*, affirming the decision of the Court of Appeal, that the English Court had jurisdiction to administer the trusts of the will as to the whole estate, both Scotch and English; and that as no proceedings were pending in a Scotch Court (if such were possible) by which the interests of the infant plaintiff could have been equally protected, the jurisdiction was not discretionary, but that the decree was a matter of course.—The dicta of Lord Westbury in *Enohin* v. *Wylie* (10 H. L. C. 1) disapproved. Ewing *v.* Orr Ewing - - - 34

ADULTERY — Condonation — Divorce — Scotch law - - - - - 205
See Scotch Law. 4.

AMBIGUITY—Time policy - - 345
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APPARENT POSSESSION—Bill of sale - 653
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APPEAL—Probate and Divorce Division - 631
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See Local Government Acts.

ASSIZE COURTS—Income tax - - 61
See Income Tax.

BANKER—Account—Over-drawing—Borrowing powers - - - - 857
See Building Society. 3.

—— Cheque—Scotch law - - - 95
See Scotch Law. 2.

BANKRUPTCY—*Disclaimer of Lease by Trustee on Bankruptcy of Assignee of Lease—Liability of Lessor after Disclaimer—Bankruptcy Act* 1869 (32 *&* 33 *Vict. c.* 71) *s.* 23.] The assignee of a lease for a term of years became bankrupt, and his trustee by leave of the Court disclaimed under sect. 23 of the Bankruptcy Act 1869 (32 & 33 Vict. c. 71) all the bankrupt's property and interest in the premises. The lessor having brought an action against the original lessee upon his covenant to pay rent for the rent accrued due since the appointment of the trustee:—*Held*, affirming the decision of the Court of Appeal, by Earl Cairns and Lords Blackburn and Watson, Lord Bramwell dissenting, that notwithstanding the disclaimer the lessee remained liable upon his covenant. Hill *v.* East and West India Dock Company - - - - - 448

—— Law of Mauritius - - - 413
See Mauritius, Law of.

—— Scotch law - - - - 966
See Scotch Law. 1.

BARRISTER—Law of Quebec—Remuneration
See Canada, Law of. 3. [745

BILL OF EXCHANGE—Cheque—Scotch law 95
See Scotch Law. 2.

BILL OF SALE—*Registration not renewed—Apparent Possession—Bills of Sale Acts* 1854 (17 *&* 18 *Vict. c.* 36) *ss.* 1, 7—1866 (29 *&* 30 *Vict. c.* 96) *s.* 5—1878 (41 *&* 42 *Vict. c.* 31) *s.* 8—1882 (45 *&* 46 *Vict. c.* 43) *s.* 3.] In 1873 S. executed a bill of sale of furniture to the respondents to secure a loan, with an absolute unconditional power to take possession and sell in case of default of payment upon demand. The bill was duly registered, but never re-registered. In 1883 the respondents, in order to protect the furniture from S.'s creditors, demanded payment and on default took possession of the furniture and sold it to C., giving him a receipt for the purchase-money though no money actually passed. At the same time C. not being able to pay executed a bill of sale of the furniture to the respondents to secure the purchase-money. This bill was duly registered: the receipt was not registered. The transaction with C. was found by the jury to be a bonâ fide one. The furniture having been afterwards seized under a fi. fa. against S.:—*Held*, affirming the decision of the Court of Appeal, that the sale to C. being an absolute and bonâ fide transfer of the property, the bill of 1873 was spent and satisfied, and the Bills of Sale Acts of 1854, 1866, 1878, and 1882 had no application whatever to it at the time of the execution, whether the furniture was or was not at that time in the apparent possession of S.; and that the respondents were entitled to he furniture. Cookson *v.* Swire - - 653

BORROWING POWERS—Building society 519,
See Building Society. 2, 3. [857

BREACH OF TRUST—Loss by broker - 1
See Trustee.

BROKER—Loss of trust fund - - 1
See Trustee.

BUILDING SOCIETY—*Arbitration—Building Societies Act* 1874 (37 *&* 38 *Vict. c.* 42) *s.* 16, *sub-s.* 9, *s.* 34—*Jurisdiction of High Court over Dispute between Society and Member.*] When the rules of

BUILDING SOCIETY—*continued.*

a benefit building society governed by 37 & 38 Vict. c. 42 provide for the settlement by arbitration of disputes between the society and any of its members, the High Court has no jurisdiction to entertain an action by the society against a member for moneys due to it under covenants in mortgage deeds executed by the member, as such, to the society:—So *held* by Lords Blackburn and Watson, the Earl of Selborne L.C. dissenting.—*Wright* v. *Monarch Investment Building Society* (5 Ch. D. 726) and *Hack* v. *London Provident Building Society* (23 Ch. D. 103) approved. Municipal Permanent Investment Building Society *v.* Kent - - - - 260

2. —— *Borrowing Powers—Unlimited Power of Borrowing—Deposit of Deeds—Preference Shares—Priorities in Winding-up—Certificate of Barrister*—6 *&* 7 *Wm.* 4 *c.* 32.] A benefit building society, enrolled under 6 & 7 Wm. 4 c. 32, by its 32nd rule authorized the directors from time to time, as occasion might require, to borrow any sums of money at interest from any persons; the borrowed money to be a first charge upon the funds and property of the society.—Under this rule the directors borrowed large sums for the proper purposes of the society, and deposited with the lenders, as security, title deeds of properties which had been mortgaged to the society by advanced members:—*Held*, reversing the decision of the Court of Appeal, that the rule was valid, and that the lenders were entitled in the winding-up to payment out of the assets, after satisfaction of the outside creditors, and in priority to the claims of all shareholders or members; but that the lenders must give up their securities to the official liquidator, the claim to special equitable charges upon specific properties being inconsistent with the true meaning of the rule, which was that all the moneys borrowed under it were to have the benefit, equally and pari passu, of a first charge upon the general funds and property.—Lord Hatherley's dictum in *Laing* v. *Reed* (Law Rep. 5 Ch. 8) as to an unlimited power of borrowing, overruled.—The 31st rule authorized the board to issue deposit or paid-up shares for £30 each at 5 per cent. interest with the right of withdrawing the whole or part of the deposit upon notice in preference to all other shares.—This rule was struck out by the certifying barrister, but the directors printed and acted upon it by issuing shares accordingly. Some years afterwards the rule was amended, by altering £30 into £1, and the amendment was certified by the barrister; and those who had taken £30 shares had them exchanged for £1 shares, and other £1 shares were issued to new shareholders. The moneys paid by these shareholders were applied for the purposes of the society:—*Held*, affirming the decision of the Court of Appeal, that such shareholders, whether they had become so before or after the amendment was certified, and whether they had given notice of withdrawal or not, were entitled to be paid in the winding-up in preference to the unadvanced members. Murray *v.* Scott. Agnew *v.* Murray. Brimelow *v.* Murray - - - - - - 519

3. —— *Borrowing Powers—Overdrawing Banker's Account—Payments to withdrawing*

BUILDING SOCIETY—*continued.*

Members—Lien, equitable — Rule in Clayton's Case (1 Mer. 572).] A benefit building society which had no power to borrow money, was allowed by its bankers to make large overdrafts. In 1876 a memorandum was signed by the officers of the society and confirmed by the directors stating that certain deeds of borrowing members which had been deposited with the bankers were deposited not only for safe custody, but as a security for the balance from time to time. In 1881 an order for winding up the society was made, and the bankers claimed to retain the deeds as security for the balance of their account. No evidence was given as to the application of the money which was drawn out by the society; but it was admitted that some part was applied in payment of members withdrawing from the society, and the remainder in payment of salaries, legal expenses, and expenses of mortgaged property.—The Court of Appeal held that the overdrafts were ultrà vires, being a borrowing not authorized by the rules, and not properly incident to the course and conduct of the society's business for its proper purposes; and that the bankers were not creditors of the society in respect of the overdrafts; but that they were entitled to hold the deeds as a security for repayment of so much only of the moneys advanced by them as was applied in payment of the debts and liabilities of the society properly payable and had not been repaid to the bankers, excluding payments to withdrawing members; that the burden of proving this lay on the bankers, and that in satisfying that burden the bankers could not have the benefit of the rule in *Clayton's Case* (1 Mer. 572).—The Court of Appeal made an order accordingly, directing inquiries; with a declaration that in making the inquiries the bankers were to be charged with all sums received by them on account of the society since it ceased to have any balance to its credit with the bankers, and that they were not to be allowed any sums advanced by them since that date which were applied in making payments to withdrawing members or otherwise than in paying such debts and liabilities of the society as aforesaid. The society did not appeal against the order; the bankers did.—Without expressing any opinion upon the question of payments to withdrawing members, or the bankers' right to hold the securities, *held*, that the decision and order of the Court of Appeal were in other respects right. BROOKS & CO. *v.* BLACKBURN BUILDING SOCIETY - - 857

CANADA, LAW OF—*Dominion—British North America Act*, 1867, *ss.* 91, 92—*Canadian Act*, 37 *Vict. c.* 103—*Powers of Dominion Parliament.*] *Held*, that Canadian Act 37 Vict. c. 103, which created a corporation with power to carry on certain definite kinds of business within the Dominion was within the legislative competence of the Dominion Parliament. The fact that the corporation chose to confine the exercise of its powers to one province and to local and provincial objects did not affect its status as a corporation, or operate to render its original incorporation illegal as ultrà vires of the said Parliament.—*Held*, further, that the corporation could not be prohibited generally from acting as such within the province; nor could it be restrained from doing specified acts in violation of the provincial law upon a petition not directed and adapted to that purpose. COLONIAL BUILDING AND INVESTMENT ASSOCIATION *v.* ATTORNEY-GENERAL OF QUEBEC - - - - 157

2. —— *Quebec—Civil Code of Quebec, sect.* 501—*Riparian Proprietors — Servitudes—Accumulation of Flow of Water.*] By sect. 501 of the Civil Code of Quebec the proprietor of the higher land can do nothing to aggravate the servitude of the lower land. Where the plaintiffs, being entitled to a flow of water from their land, executed certain works which had the effect of accumulating the volume of water. and probably of increasing the depth of its channel:—*Held*, that to the extent of such accumulation and consequent increase of flow, they had aggravated the servitude of the lower land, and to that extent had no right to demand a free course for the water sent down by them. Having insisted on their right to the existing flow, and refused to allege and prove a case for relief pro tanto, their suit was dismissed with costs. FRECHETTE *v.* LA COMPAGNIE MANUFACTURIÈRE DE ST. HYACINTHE 170

3. —— *Quebec — Rights and Remedies of Quebec Barristers—Quantum meruit—Canada Petition of Right Act*, 1876, *sect* 19, *sub-s.* 3.] According to the law of Quebec, a member of the Bar is entitled, in the absence of special stipulation, to sue for and recover on a quantum meruit in respect of professional services rendered by him, and may lawfully contract for any rate of remuneration which is not contra bonos mores, or in violation of the rules of the Bar.—Where a member of the Bar of Lower Canada (Quebec) was retained by the Government as one of their counsel before the Fisheries Commission sitting in Nova Scotia, *held*, that in the absence of stipulation to the contrary, express or implied, he must be deemed to have been employed upon the usual terms according to which such services are rendered, and that his status in respect both of right and remedy was not affected either by the lex loci contractûs or the lex loci solutionis.—*Held*, further, that the Petition of Right, Canada, Act, 1876, sect' 19, sub-s. 3, does not in such case bar the remedy against the Crown by petition.—*Kennedy* v. *Brown* (13 C.B. (N.S.) 677) commented upon. THE QUEEN *v.* DOUTRE - 745

4. —— *Quebec—Timber Limits—Consolidated Statutes of Canada, c.* 23—*Priority of Licenses—Warranty on Sale.*] On a sale of "timber limits" held under licenses in pursuance of the Consolidated Statutes of Canada, c. 23, a clause of simple warranty (garantie de tous troubles généralement quelconques) does not operate to protect the purchaser against eviction by a person claiming to be entitled under a prior license to a portion of the limits sold. DUCONDU *v.* DUPUY - 150

5. —— *Ontario—British North America Act*, 1867, *ss.* 91, 92—*Liquor License Act of* 1877, *c.* 181, *Revised Statutes of Ontario — Powers of Local Legislature—Regulations of Local Board—Imprisonment with Hard Labour.*] Subjects which in one aspect and for one purpose fall within sect. 92 of the British North America Act, 1867, may in another aspect and for another

CANADA, LAW OF—*continued.*
purpose fall within sect. 91.—*Russell* v. *The Queen* (7 App. Cas. 829) explained and approved.—*Held*, that "The Liquor License Act of 1877, c. 181, Revised Statutes of Ontario," which in respect of sects. 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., does not in respect of those sections interfere with "the general regulation of trade or commerce," but comes within Nos. 8, 15, and 16, of sect. 92 of the Act of 1867, and is within the powers of the provincial legislature.—*Held*, further, that the local legislature had power by the said Act of 1867 to entrust to a Board of Commissioners authority to enact regulations of the above character, and thereby to create offences and annex penalties thereto. "Imprisonment" in No. 15 of sect. 92 of the Act of 1867 means imprisonment with or without hard labour. Hodge *v.* The Queen - - - - 117

6. —— *Ontario—Canadian Act*, 12 *Vict. c.* 87, *s.* 5—*Right to float Timber down the Streams—Right to use Improvements without Compensation.*] *Held*, that the right conferred to float timber and logs down streams by Canadian Statute 12 Vict. c. 87, s. 5, is not limited to such streams as in their natural state, without improvements, during freshets, permit said logs, timber, &c., to be floated down them, but extends to the user without compensation of all improvements upon such streams, even when such streams have been rendered floatable thereby.—*Boale* v. *Dickson* (13 U. C. C. P. 337) overruled.—Such right is only conferred by the statute during freshets; *quære* as to the rights at other seasons of the year of the parties, that is, of the lumberers on the one side, and the owners of the improvements and the bed of the stream whereon they have been effected, on the other. Caldwell *v.* McLaren - 392

CAPE OF GOOD HOPE, LAW OF—*Equitable Jurisdiction—Removal of Trustees.*] There is a jurisdiction in Courts of Equity to remove old trustees and substitute new ones in cases requiring such a remedy.—The main principle on which such jurisdiction should be exercised is the welfare of the beneficiaries and of the trust estate.—Case in which their Lordships, overruling the decree of the Court below, held that the trustees (the Board of Executors of Cape Town, a body incorporated by an ordinance of the Cape of Good Hope) should, in the special circumstances of the case, be removed without costs of appeal, the Appellant having persisted in charges of fraud which the evidence did not sustain. Letterstedt *v.* Broers - - 371

CASES—*Bank of Bengal* v. *Macleod* (5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35) distinguished - - - - 561
See Power of Attorney.

—— *Blandford* v. *Blandford* (8 P. D. 19) considered - - - - 205
See Scotch Law. 4.

—— *Boale* v. *Dickson* (13 U. C. C. P. 337) overruled - - - - - 392
See Canada, Law of. 6.

—— *Clayton's Case* (1 Mer. 572) distinguished
See Building Society. 3. [857

CASES—*continued.*

—— *Clerk* v. *Dumfries Commissioners of Supply* (7 Court Sess. Cas. 4th Ser. 1157) disapproved - - - - 61
See Income Tax.

—— *Colvill* v. *Wood* (2 C. B. 210) commented on
See Waterworks Company. [49

—— *Cumber* v. *Wane* (1 Str. 426) followed 605
See Accord and Satisfaction.

—— *Currie* v. *Misa* (Law Rep. 10 Ex. 153; 1 App. Cas. 153) commented on - 95
See Scotch Law. 2.

—— *Davies* v. *Mann* (10 M. & W. 546) followed
See Ship. 5. [873

—— *De la Chaumette* (9 B. & C. 208) explained
See Scotch Law. 2. [95

—— *Dent* v. *Dent* (34 L. J. (P. M. & Ad.) 118; 4 Sw. & Tr. 106) questioned - 205
See Scotch Law. 4.

—— *Durant* v. *Durant* (1 Hagg. Ecc. Rep. 761) disapproved - - - 265
See Scotch Law. 4.

—— *Eastern Counties and London and Blackwall Railway Companies* v. *Marriage* (9 H. L. C. 32) distinguished - - 365
See Victoria, Law of.

—— *Enohin* v. *Wylie* (10 H. L. C. 1), Lord Westbury's dicta disapproved - - 34
See Administration.

—— *Hack* v. *London Provident Building Society* (23 Ch. D. 103) approved - - 260
See Building Society. 1.

—— *Hutchinson* v. *National Loan Assurance Company* (7 Court Sess. Cas. 2nd Series, 471) not approved - - - 671
See Insurance, Life.

—— *Kennedy* v. *Brown* (13 C. B. (N.S.) 677) commented on - - - 745
See Canada, Law of. 3.

—— *Laing* v. *Reed* (Law Rep. 5 Ch. 8) Lord Hatherley's dictum overruled - 519
See Building Society. 2.

—— *Life Insurance Company* v. *Foster* (11 Court Sess. Cas. 3rd Series, 351) distinguished - - - - 671
See Insurance, Life.

—— *Macdonald* v. *Union Bank* (2 Court Sess. Cas. 3rd Series, 963) approved - 95
See Scotch Law. 2.

—— *Mackay* v. *Dick* (6 App. Cas. 262) followed
See Scotch Law. 2. [95

—— *Mersey Docks Trustees* v. *Gibbs* (Law Rep 1 H. L. 23) approved - - 418
See New Zealand, Law of. 1

—— *Parnaby* v. *Lancaster Canal Company* (11 Ad. & E. 223) approved - - 418
See New Zealand, Law of. 1.

—— *Pinnel's Case* (5 Rep. 117 a) followed 605
See Accord and Satisfaction.

—— *Ramsden* v. *Dyson* (Law Rep. 1 H. L. 129) approved - - - - 699
See New Zealand, Law of. 2.

—— *Russell* v. *Reg.* (7 App. Cas. 829) explained and approved - - - 117
See Canada, Law of. 5.

CASES—*continued.*

—— *Wright* v. *Monarch Investment Building Society* (5 Ch. D. 726) approved - 260
See BUILDING SOCIETY. 1.

CERTIFICATE OF BARRISTER — Building society - - - - 519
See BUILDING SOCIETY. 2.

CEYLON, LAW OF—*Roman-Dutch Law of Holland—Right of the Subject to sue the Crown—Right of Set-off between the Crown and the Subject.*] There is no authority for saying that the Roman-Dutch law of Holland, which was in force in Ceylon at the date of its conquest by the British, and has not since been abrogated, empowered the subject to sue the Government.—But since the conquest a very extensive practice of suing the Crown has sprung up and has been recognised by the Legislature: see the 117th section of Ordinance No. 11 of 1868, which re-enacted an Ordinance of 1856:—*Held*, therefore, that such suits are now incorporated into the law of the land.—*Held*, further, that where the Crown is plaintiff and the defendants sue in reconvention, the Court is not bound to give separate judgments, but may set off the amount awarded to the defendants against that awarded to the Crown, and give judgment for the balance. HETTIHEWAGE APPU *v.* THE QUEEN'S ADVOCATE [571

CHARTER—Force of—Market - - 927
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CHARTERPARTY - - - - 470
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See SCOTCH LAW. 2.

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CLAYTON'S CASE—Rule in - - - 857
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—— New Zealand—Public Works Act - 699
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—— Public Health Act - - - 595
See LOCAL GOVERNMENT ACTS.

—— Railway company—Resumption of grant by Crown - - - - 142
See WEST AUSTRALIA, LAW OF.

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CONDONATION—Adultery—Scotch law 205
See SCOTCH LAW. 3.

CONSIDERATION—Accord and satisfaction 605
See ACCORD AND SATISFACTION.

CONTRACT—Sale of goods - - - 434
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COUNTERCLAIM—Set-off—Winding-up of company - - - - - 434
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COVENANT—Renewable lease - - 844
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DEBTOR AND CREDITOR—Accord and satisfaction - - - - 605
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ESTATE TAIL—Rule in Shelley's Case - 890
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EXECUTIVE GOVERNMENT—Liability of 418
See NEW ZEALAND, LAW OF. 1.

EXECUTOR—*Purchase of Testator's Estate by an Executor who has not proved—Suit to set aside Sale.*] *Held*, that a sale is not to be avoided merely because when entered upon the purchaser has the power to become trustee of the property purchased, as for instance by proving the will which relates thereto, though in point of fact he never does become such. Such a purchaser is under no disability, and in order to avoid such sale it must be shewn that he in fact used his power in such a way as to render it inequitable that the sale should be upheld. CLARK *v.* CLARK 733

FACT, MATTER OF—Matter of opinion - 671
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FALSE REPRESENTATION—*Action of Deceit—Fraudulent Misrepresentation ambiguous in Meaning—Burden of Proof on Plaintiff.*] The prospectus of a company which was being formed to take over ironworks, contained a statement that "the present value of the turnover or output of the entire works is over £1,000,000 sterling per annum." If that statement meant that the works had actually in one year turned out produce worth at present prices more than a million, or at that rate per year it was untrue. If it meant only that the works were capable of turning out that amount of produce it was true. In an action of deceit for fraudulent misrepresentation whereby the plaintiff was induced to take shares he swore in answer to interrogatories that he "understood the meaning" of the statement "to be that which the words obviously conveyed," and at the trial was not asked either in examination or cross-examination what interpretation he had put upon the words:—*Held*, by the EARL OF SELBORNE L.C. and LORDS BLACKBURN and WATSON, affirming the decision of the Court of Appeal, that the statement taken in connection with the context was ambiguous and capable of the two meanings; that it lay on the plaintiff to prove that he had interpreted the words in the sense in which they were false and had in fact been deceived by them into taking the shares, and that as he had as a matter of fact failed to prove this the action could not be maintained.—*Held*, by LORD BRAMWELL, that the statement was capable only of the meaning in which it was untrue, and that the plaintiff had proved that he had understood it in that sense; but that there was not sufficient evidence that the statement was fraudulent on the part of the defendants, and that the decision of the Court of Appeal should be affirmed on that ground. SMITH *v.* CHADWICK - - - - - 187

—— Life insurance - - - - 671
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FIDUCIARY RELATION—Executor who has not proved - - - - - 733
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HUSBAND AND WIFE—Law of Natal—Surety bond by wife - - - - 715
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—— Scotch law - - - 203, 205
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IMPRISONMENT—Law of Ontario - 117
See CANADA, LAW OF. 5.

INCLOSURE—*Inclosure Act, Construction of—Mines—Manorial Rights—Support—Damage to Surface — Compensation.*] An Inclosure Act enacted that allotments should be made to the persons having a right of common upon the waste of the manor, that is, to the owners of every separate ancient dwelling-house within the manor; that all right of common should be extinguished; and that the allotments should be held and enjoyed by the allottees by the same tenure and estates as the respective dwelling-houses: provided that nothing should prejudice, lessen, or defeat the title and interest of the lords of the manor to and in the royalties, but that the lords and their successors as owners of the royalties should for ever hold and enjoy all "rents, courts, perquisites, profits, mines, power of using or granting wayleave, waifs, estrays, and all other royalties and jurisdictions whatsoever" to the owners of the manor appertaining "in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made." Provided further, that in case the lords or any persons claiming under them should work any mines lying under any allotment, or should lay, make, or use any way or ways over any allotment, such persons so working the mines, or laying, making, or using such way or ways should make "satisfaction for the damages and spoil of ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil;" such satisfaction to be settled by arbitration and "not to exceed the sum of £5 yearly during the time of working such mines or continuing or using such way or ways for every acre of ground so damaged or spoiled."—At the time of passing the Act there were no customs which enlarged or cut down the common law rights of the lords to work the minerals under the wastes of the manor. Under the Act an allotment was made in 1772 to a commoner in respect of an ancient freehold

INCLOSURE—*continued.*
dwelling-house. At that time no house had been built upon the allotment. More than twenty years after a house had been built upon it, the minerals underlying it were worked by lessees of the lords of the manor so as to cause the surface of the land to subside, whereby the house was damaged to an amount exceeding the sum recoverable under the proviso. The land would have subsided if there had been no house. An action for damages having been brought against the lessees by the allottee's successor in title and by his tenant in possession:—*Held*, affirming the decision of the Court of Appeal, that upon the true construction of the Act, the proviso for satisfaction did not apply to damage from subsidence; that there was nothing in the Act giving the lords the right to let down the surface; that the plaintiffs were entitled to have the house and land supported by the minerals, and to recover damages for the subsidence. Love *v.* Bell - 286

INCOME TAX—*Revenue—Assize Courts—Police Stations—5 & 6 Vict. c. 35—16 & 17 Vict. c. 34, Schedules A and B.*] The justices of a county in the due exercise of statutory powers erected assize courts with the usual rooms and offices, and a county police station with the usual offices and accommodation for constables living there and for prisoners. The land on which they were built was conveyed under 21 & 22 Vict. c. 92, to the clerk of the peace to hold to him and his successors for ever upon trust for the construction of a police station and otherwise for such uses as the county justices should from time to time order. The buildings formed one block and were used for the administration of justice and for police purposes. Parts of the buildings were also used for holding county and committee meetings and various other occasional purposes, but no rent or profit was received or made in respect of the buildings or any part of them:—*Held*, affirming the judgment of the Court of Appeal, that income tax was not payable in respect of the buildings under Scheds. A. or B. of 5 & 6 Vict. c. 35, and 16 & 17 Vict. c. 34.—*Clerk* v. *Dumfries Commissioners of Supply* (7 Court Sess. Cas. 4th Series, 1157) disapproved. Coomber *v.* Justices of the County of Berks - - - - 61

INSURANCE, LIFE—*Truth of Answers to Queries of Life Insurance Company—Express Warranty—"Strictly Temperate"—Matter of Fact and Matter of Opinion.*] A. applied to an insurance office to effect a policy on his life. He received a printed form of proposal containing questions. Among these was the following: "Question 7 (*a*) Are you temperate in your habits? (*b*) and have you always been strictly so? A. answered (*a*) "Temperate;" (*b*) "Yes." Subjoined to the printed questions was a declaration, which A. signed, to the effect that the foregoing statements were true, and that the assured agreed that this declaration should be the basis of the contract, and that if any untrue averment, &c., was made the policy was to be absolutely void and all moneys received as premium forfeited. The policy recited the above declaration as the basis of the contract. After A.'s decease the insurance company refused payment of the policy on the ground that the above-mentioned answer was

INSURANCE, LIFE—*continued.*
false in fact. In an action on the policy:—*Held*, reversing the decision of the Court below, that the declaration of A., taken in connection with the policy, constituted an express warranty that the answer to Question 7 was true in fact; and as the evidence clearly proved that A.'s averment as to his temperance was untrue, the policy was absolutely null and void.—*Life Association of Scotland* v. *Foster* (11 Court Sess. Cas. 3rd Series, 351) distinguished.—*Hutchison* v. *National Loan Assurance Company* (7 Court Sess. Cas. 2nd Series, 467) not approved of. Thomson *v.* Weems 671

INSURANCE, MARINE—*Time Policy—Negative Words—Where no General Custom of Merchants what Facts to be considered—Maxim contra proferentem.*] A time policy of marine insurance on A.'s ship, from the 29th of May, 1878, to the 28th of May, 1879, contained the words "warranted no St. Lawrence between the 1st of October and the 1st of April." The vessel was lost on the voyage home. The underwriters refused A.'s claim for a total loss on the ground of breach of warranty, inasmuch as the vessel had navigated in the Gulf of St. Lawrence during the prescribed period. A. contended that the above words referred exclusively to the River St. Lawrence. Admittedly no general custom of merchants could be proved: but the facts established that the great river which discharges the waters of the North American lakes, and the gulf into which it flows, both bear the name of "St. Lawrence"; that the navigation of both, though of the gulf in a less degree than of the river, was within the prohibited period dangerous:—*Held*, reversing the decision of the Court below, that the evidence disclosed no ambiguity or uncertainty sufficient to prevent the application of the ordinary rules of construction; and according to those rules the whole St. Lawrence navigation, both gulf and river, was within the fair and natural meaning of these negative words, and therefore prohibited during the months in question. Birrell *v.* Dryer 345

INTERROGATORIES — Privileged communication - - - - - 81
See Practice. 2.

IRISH LAND LAW ACT—*Land Law (Ireland) Act,* 1881 (44 *& 45 Vict. c.* 49) *s.* 58 *sub-s.* 3—*Landlord and Tenant—Pasture—Land let to be used wholly or mainly for Pasture.*] By a lease in 1861 lands in Ireland of more than 100 acres were demised for twenty-one years, the tenant covenanting that he would not without the landlord's consent break up or have in tillage in any one year any greater quantity than ten acres, out of a certain specified portion, and that he would manage the land in a good and husbandlike manner and in due and regular course so that the same might not be in any way injured:—At the time of the demise there were only fifteen acres in tillage, and the rest was used as pasture, but was not ancient pasture, the whole farm having been put in tillage (in different portions at different times) between 1852 and 1861. The tenant used the farm as a dairy farm: frequently meadowing different portions (about twenty acres each year), and sometimes selling hay off the land:—*Held*, affirming the decision of the Court of Appeal (Ireland), that the farm was not a "holding

IRISH LAND LAW ACT—*continued.*
let to be used wholly or mainly for the purpose of pasture" within the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49) s. 58 sub-s. (3). WESTROPP *v.* ELLIGOTT - - - 815

JERSEY, LAW OF—*Set-off—Liquid Demand.*] According to the law of Jersey a claim by way of compensation or set-off is admissible, when it is for a liquid demand.—Such claims having been dismissed by the Court below the case was remanded to ascertain whether they were in whole or in part liquid debts or debts "incontestées ou du moins incontestables" as alleged by the appellants. DYSON *v.* GODFRAY - - - 726

JURISDICTION—Equitable—Removal of trustees - - - - - 371
See CAPE OF GOOD HOPE, LAW OF.

—— High Court of Justice—Dispute in building society - - - - 260
See BUILDING SOCIETY. 1.

—— Scotch assets — Administration action in England - - - - 34
See ADMINISTRATION.

—— Vice-Admiralty - - - - 356
See SHIP. 2.

LAND—Taken by railway company—Easement
See LANDS CLAUSES ACT. 1. [787

LAND LAW (IRELAND) ACT - - 815
See IRISH LAND LAW ACT.

LANDLORD AND TENANT—Disclaimer of lease—Bankruptcy - - - 448
See BANKRUPTCY.

—— Irish Land Law Act - - - 815
See IRISH LAND LAW ACT.

—— Renewable lease - - - 844
See RENEWABLE LEASE.

LANDS CLAUSES ACT—*Railway Company—Compulsory Powers—Easement—Hereditaments—"Land," whether includes Incorporeal Hereditaments — Lands Clauses Consolidation Act* 1845 (8 & 9 *Vict. c.* 18) *ss.* 3, 16, 84, 85.] By a special Act the S. Co. were authorized to make a railway and to carry it across the railway of the G. W. Co., at one point by a bridge over and at another by an archway under that railway, the archway to remain the property of the G. W. Co. The Act by s. 8, which was inserted at the instance of the G. W. Co. for their protection, provided that the S. Co. should not purchase and take any land of the G. W. Co. which the S. Co. were authorized to use, enter upon or interfere with, but that the S. Co. might purchase and take, and the G. W. Co. should sell and grant accordingly, an easement or right of using the same in perpetuity for the purposes of the Act; and by s. 9 that if any dispute should arise respecting the matters aforesaid it should be settled by an arbitrator to be appointed under the Act. The Lands Clauses Act, 1845 (except where expressly varied by the Act), was incorporated therewith, and it was enacted that the words and expressions to which meanings were assigned by the Lands Clauses Act should have the same respective meanings unless there was something in the subject or context repugnant to such construction.—The S. Co. gave the G. W. Co. a notice to treat for the purchase of an easement or right in or over lands of the G. W. Co. for the purposes of the crossings, and shortly afterwards a notice of their desire to enter upon and use the lands for those purposes, and of their intention to apply to the Board of Trade to appoint a surveyor to determine the value of such easement or right. The valuation was made, and the S. Co. deposited the amount and entered into a bond under s. 85 of the Lands Clauses Act.—The G. W. Co. having brought an action for an injunction to restrain the S. Co. from entering or continuing upon the lands mentioned in the notice to treat or from putting in force any of the powers of the special Act or of the Lands Clauses Act in relation to the compulsory purchase of land, on the ground that the capital of the S. Co. had not been duly subscribed as required by s. 16 of the Lands Clauses Act:—*Held*, by LORDS BRAMWELL and FITZGERALD, affirming the decision of the Court of Appeal, LORD WATSON dissenting, that the S. Co. could not be restrained on that ground:—By LORD FITZGERALD, That (1) the assertion of the rights conferred by s. 8 of the special Act was not a "putting in force of the powers of the Lands Clauses Act or of the special Act in relation to the compulsory taking of land": and (2) that even if the perpetual easements created by s. 8 of the special Act would constitute "land" within s. 16 of the Lands Clauses Act, yet the case had been taken out of the compulsory powers of the Lands Clauses Act by s. 8 of the special Act. GREAT WESTERN RAILWAY COMPANY *v.* SWINDON AND CHELTENHAM RAILWAY COMPANY - - - - 787

2. —— *Railway Company — Compulsory Powers—Powers for Completion—Entry under s.* 85 *of the Lands Clauses Act,* 1845, *shortly before Expiration of Period allowed for completion of Railway—Right of Company to take Possession without Sheriff—Lands Clauses Consolidation Act,* 1845 (8 & 9 *Vict. c.* 18), *ss.* 68, 84, 85, 91.] The special Act of a railway company enacted that "the powers of the company for the compulsory purchase of lands for the purposes of this Act shall not be exercised after the expiration of three years from the passing of this Act;" and that "if the railways are not completed within five years from the passing of this Act, then on the expiration of that period the powers by this Act granted to the company for making and completing the railways or otherwise in relation thereto, shall cease to be exercised except as to so much thereof as is then completed." A few days before the expiration of the three years the company served on a landowner a notice to treat for part of his land. A correspondence ensued, no agreement was come to, and the compensation was not assessed. Thirteen days before the expiration of the five years the company, having complied with the requirements of s. 85 of the Lands Clauses Act, 1845, entered and proceeded to make the railway, the landowner objecting and resisting. The land was bonâ fide required for the railway:—*Held*, reversing the judgment of the Court of Appeal and restoring the judgment of Fry, J., that whether the railway could or could not have been completed within the thirteen

LANDS CLAUSES ACT—*continued.*
days, the entry under s. 85 was lawful; that the company could not be restrained by injunction, but were entitled to remain and complete the railway after the expiration of the five years. Tiverton and North Devon Railway Company *v.* Loosemore - - - - - - 480

LEASE—Covenant to renew - - 844
See Renewable Lease.

—— Disclaimer—Bankruptcy - - 448
See Bankruptcy.

LEASEHOLD—Renewable - - - 844
See Renewable Lease.

LIABILITY OF TRUSTEE - - - 1
See Trustee.

LICENSE—Timber limits - - - 150
See Canada, Law of. 4.

LICENSE ACT—Ontario - - - 117
See Canada, Law of. 5.

LIEN—Maritime - - - - 356
See Ship. 2.

LIFE INSURANCE - - - - 671
See Insurance, Life.

LIQUID DEMAND—Law of Jersey - 726
See Jersey, Law of.

LOADING—Delay of—Frost - - 470
See Ship. 1.

LOCAL BOARD—Ontario - - - 117
See Canada, Law of. 5.

LOCAL GOVERNMENT ACTS—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 179, 180, 308—*Arbitration under the Act—Jurisdiction of Arbitrator when Liability under the Act is bonâ fide disputed.*] When a claim for compensation is made against a local authority for damage caused by the exercise of the powers conferred upon them by the Public Health Act, 1875, the arbitrator has jurisdiction to hold the arbitration and make his award as to the fact of damage and the amount of compensation under sects. 179, 180, and 308, although the local authority bonâ fide dispute their liability to make compensation at all under the Act. Their proper course is to raise the question of liability in their defence to an action upon the award.—So *held,* affirming the decision of the Court of Appeal. Brierley Hill Local Board *v.* Pearsall - - 595

MARINE INSURANCE—Time policy—Negative words - - - - - 345
See Insurance, Marine.

MARITIME LIEN - - - - - 356
See Ship. 2.

MARKET—*Disturbance—Charter, Force of—Waiver of Statutory Rights—Accommodation provided by Lord of Market.*] A charter of 1st Edward III. made by the King "with the assent of the prelates, earls, barons, and all the commons of our realm assembled in our present Parliament," granted to the citizens of the city of London certain privileges, and among them "that no market within seven miles round about the city shall be granted by us or our heirs to any one." By letters patent in the 34th Charles II., reciting an inquisition founded on a writ of ad quod damnum, the King granted to the respondents' predecessor in title the right of holding markets on Thursday and Saturday in every week in Spittal Square within the seven miles.—User of the market was proved since 1723. The appellant company set up a depôt or row of stalls at their terminus within 300 yards of Spittal Square and let them to dealers for the purpose of selling fruit and vegetables brought up by their railway, and justified their depôt on the ground that the respondents' market was very crowded, that it was difficult for dealers to get stalls there, and that if any persons other than the respondents' tenants wished to sell in the respondents' market there would be no room for them; and that the respondents' market infringed the provisions of certain Paving Acts:—*Held,* affirming the decision of the Court of Appeal, that the charter of Edward III. had, at the most, the force of a private or personal statute, and concerned the corporation of London only and not the general public; that the consent of the corporation was to be presumed to the letters patent of Charles II.; that the letters patent of Charles II. conferred a valid right of market; that the company's depôt was in fact a rival market, and a disturbance of the respondents' right of market, and entitled the respondents to an injunction to restrain the company from using their depôt in the above manner or so as to interfere with the respondents' rights; and that even if the company had proved that there was not sufficient accommodation in the respondents' market, or that the Paving Acts had been infringed, those circumstances would have afforded no answer to the action for an injunction. Great Eastern Railway Company *v.* Goldsmid [927

MARRIAGE CONTRACT—Settlement—Scotch law - - - - - - 303
See Scotch Law. 2.

MARRIED WOMAN—Law of Natal—Surety bond - - - - - - 715
See Natal, Law of.

MAURITIUS, LAW OF—*Mauritius Ordinance of* 1853, *No.* 33, *ss.* 40, 43, 50—*Validity of Adjudication of Bankruptcy.*] The Court of Bankruptcy of the Mauritius has jurisdiction to order adjudication against a firm on the petition of the sole member of that firm. Such order is valid against the petitioner personally.—Under sects. 40, 43, and 50 of Ordinance No. 33 of 1853, a creditor cannot challenge the validity of such order on the ground that the bankrupt has not made it appear to the satisfaction of the Court that his estate is sufficient to pay his creditors at least five shillings in the pound clear of all bankruptcy charges. Such qualified solvency is not a fact to be put in issue and proved, but provisionally to appear to the satisfaction of the Court, the propriety of whose conclusion cannot by any process be contested. Oriental Bank Corporation *v.* Richer & Co. [413

MISREPRESENTATION—Action of deceit 187
See False Representation.

—— Answers to queries of life insurance company - - - - - - 671
See Insurance, Life.

MELBOURNE HARBOUR TRUST - - 365
See VICTORIA, LAW OF.

MINES—Inclosure Act—Manorial rights 286
See INCLOSURE.

NATAL, LAW OF—*Surety Bond by a Woman—Effect of Non-Renunciation of Legal Privileges.*] By the law which prevails in Natal a woman cannot be effectually bound as a surety, unless she specially renounces the privileges secured to her by the Senatûs Consultum Villeianum and other rules of law.—Where a husband under a general power of attorney from his wife professed to bind her personally as surety under a mortgage bond duly executed, *held*, that, there being no authority to renounce as aforesaid, express or implied, given by the power of attorney, such deed was void. MACKELLAR *v.* BOND - 715

NAVIGATION—Collision - 136, 640, 873
See SHIP. 3, 4, 5.

NECESSARIES—For ship - - - 356
See SHIP. 2.

NEGLIGENCE—Collision - 136, 640, 873
See SHIP. 3, 4, 5.

—— Contributory - - - - 136, 640
See SHIP. 3, 4.

—— Executive Government—Liability - 418
See NEW ZEALAND, LAW OF. 1.

NEW SOUTH WALES, LAW OF—*New South Wales Act*, 43 *Vict. No.* 25, *ss.* 3, 5—*Right to run Steam Motors on Tramways.*] *Held*, that the Commissioner for Railways in New South Wales has, according to the true construction of Act 43 Vict. No. 25, sect. 3, a legal right to run steam motors upon the tramway lines mentioned in the 2nd schedule thereto.—*Semble*, sect. 5 is sufficient to legalise the use of steam motors upon the other tramways governed by the said Act. COMMISSIONER FOR RAILWAYS *v.* TOOHEY - - 720

NEW ZEALAND, LAW OF—*New Zealand Crown Suits Act*, 1881 (45 *Vict. No.* 8), *sect.* 37—*Executive Government—Liability for Negligence—Reasonable Care—Damage to Vessels using the Defendant's Staiths.*] Where the Executive Government possessed the control and management of a tidal harbour with authority to remove obstructions in it, and the public had a right to navigate therein, subject to the harbour regulations and without payment of harbour dues; the staiths and wharves belonging to the Executive Government which received wharfage and tonnage dues in respect of vessels using them:—*Held*, that there was a duty imposed by law upon the Executive Government to take reasonable care that vessels using the staiths in the ordinary manner might do so without damage to the vessel. Reasonable care is not shewn when after notice of danger at a particular spot, no inquiry is made as to its existence and extent, and no warning is given.—The principle of liability for negligence established by *Parnaby* v. *Lancaster Canal Company* (11 Ad. & E. 223) and *Mersey Docks Trustees* v. *Gibbs* (Law Rep. 1 H. L. 93) approved of and applied to the Executive Government in the above circumstances, which were distinguishable in respect of non-receipt of harbour dues; notwithstanding the Crown Suits Act, 1881, sect. 37. THE QUEEN *v.* WILLIAMS - - - - - 418

NEW ZEALAND, LAW OF—*continued.*

2. —— *Right to Compensation—Wellington Harbour Board and Corporation Act*, 1880—*The Public Works Act*, 1882, *s.* 4—"*Estate or interest in land.*"] Land having become vested in the respondents under the Wellington Harbour Board and Corporation Land Act, 1880 (44 Vict. No. 21), the appellants claimed compensation under the Public Works Act, 1882 (46 Vict. No. 37), on the ground of their having some estate or interest therein within the meaning of the latter Act.—It appeared that the appellants' lessor (or his predecessor in title) had in 1848 erected a wharf on the said land, with the permission of the Government, and in 1855 a jetty; that in 1856, at the request and for the benefit of the Government, he incurred large expenditure for the extension of his jetty and for the erection of a warehouse; that in subsequent years the Government used, paid for, and, with the consent of the said lessor, improved the said land and works:—*Held*, that the lessor must be deemed to have occupied the ground from 1848 under a revocable license to use it for the purposes of a wharfinger; that by virtue of the transactions of 1856 such license ceased to be revocable at the will of the Government, whereby the lessor acquired an indefinite, that is, practically, a perpetual right to the jetty for the purposes aforesaid. The equitable right so acquired is an "estate or interest in, to or out of land" within the wide meaning of the Act of 1882, which directs that in ascertaining title to compensation the Court should not be bound to regard strict legal rights only but should do what is reasonable and just.—*Ramsden* v. *Dyson* (Law Rep. 1 H. L. 129) approved. PLIMMER *v.* MAYOR, &c., OF WELLINGTON - 699

NOTOUR BANKRUPTCY—Scotch law - 966
See SCOTCH LAW. 1.

ONEROUS HOLDER—Cheque - - 95
See SCOTCH LAW. 2.

PARLIAMENT OF CANADA - - 157
See CANADA, LAW OF. 1.

PASTURE—Irish Land Law Act - - 815
See IRISH LAND LAW ACT.

PATENT—*Prolongation*—46 & 47 *Vict. c.* 57, *s.* 25, *cl.* 4—*Accounts of Foreign Profits.*] *Held*, that 46 & 47 Vict. c. 57, s. 25, cl. 4, does not alter the rules adopted by the Judicial Committee. It is the duty of a patentee applying for a prolongation to produce accounts of all the profits received under foreign patents in respect of his invention. *In re* NEWTON'S PATENTS - - - 592

2. —— *Prolongation—Patents, Designs, and Trade-marks Act*, 1883 (*ss.* 25, 113)—*Practice—Petition.*] *Held*, that the enactments of 46 & 47 Vict. c. 57, do not affect any patent granted before the commencement of the Act, nor any right or privilege which had accrued to the patentee before or at the commencement of the said Act, including the privilege of applying for a renewal. IN THE MATTER OF BRANDON'S PATENT. *Ex parte* DOTY - - - - - - 589

"**PERSON**"—Meaning of—Notice of action 365
See VICTORIA, LAW OF.

PETITION OF RIGHT (CANADA) ACT - 745
See CANADA, LAW OF. 3.

POLICE STATION—Income tax - - 61
See INCOME TAX.

POWER OF ATTORNEY—*Power to sell or purchase does not include Power to pledge—Principal and Agent.*] A power of attorney gave to the holders authority "for the purposes aforesaid to sign for me and in my name and on my behalf any and every contract or agreement, acceptance, or other document," the purposes aforesaid being "from time to time to negotiate, make sale, dispose of, assign, and transfer" Government promissory notes, and "to contract for, purchase, and accept the transfer" of the same:—*Held*, that upon the true construction of this power the holders were authorized to sell or purchase such notes, but not to pledge them.—*Bank of Bengal* v. *Macleod* (5 Moore, Ind. Ap. 1; 7 Moore, P. C. 35) distinguished. JONMENJOY COONDOO *v.* WATSON - - - - - - 561

POWER TO PLEDGE—Power of attorney 561
See POWER OF ATTORNEY.

PRACTICE — *Appeal — Competency — Limit of Time to Appeal from Decision of Court of Appeal in Cases from Probate and Divorce Division—Divorce and Matrimonial Act*, 1868—*Appellate Jurisdiction Act*, 1876—*Judicature Act*, 1881.] Since the Judicature Act of 1881, an appeal to the House of Lords in a matrimonial cause (where an appeal lies) can only be from a decision of the Court of Appeal; and such an appeal must be brought within one month after the decision appealed against is pronounced by the Court of Appeal, if the House of Lords is then sitting, or if not, within fourteen days after the House of Lords next sits. CLEAVER *v.* CLEAVER - 631

2. —— *Discovery — Interrogatories — Privileged Communication—Belief founded on Privileged Communications.*] A party to an action cannot be compelled to answer interrogatories asking as to his knowledge, information, or belief with regard to matters of fact, if he swears that he has no knowledge or information with regard to those matters except such as he has derived from privileged communications made to him by his solicitors or their agents; for since under those circumstances his knowledge and information are protected, so also is his belief when derived solely from such communications.—The plaintiff having been interrogated as to his knowledge, information and belief upon matters relevant to the defendant's case answered that he had no personal knowledge of any of the matters inquired into; that such information as he had received in respect of those matters had been derived from information procured by his solicitors or their agents in and for the purpose of his own case:—*Held*, affirming the decision of the Court of Appeal, that the answer was sufficient. LYELL *v.* KENNEDY (No. 2) - - - - 81

—— Patent—Patents Act, 1883—Prolongation
See PATENT. 2. [589

—— Scotch law - - - - 95
See SCOTCH LAW. 2.

PREFERENCE SHARES—Building society 519
See BUILDING SOCIETY. 2.

PRINCIPAL AND AGENT—Power of attorney
See POWER OF ATTORNEY. [561

PRISON—*Governor— Superannuation — Compensation Allowance--Special Minute--Superannuation Act* 1859 (22 *Vict.* c. 26) *ss.* 2, 4, 7—*Prison Act* 1877 (40 & 41 *Vict.* c. 21) *s.* 36.—At the time when the Prison Act 1877 (40 & 41 Vict. c. 21) came into force C. was the governor of a prison which by that Act was transferred to the Home Secretary. Up to that time the county justices had been the prison authority. Soon after the Act came into force C. retired, and the Lords Commissioners of the Treasury awarded him an annuity calculated upon $\frac{38}{60}$ths of his salary and emoluments, or $\frac{1}{60}$th per annum for thirty-eight years; viz. $\frac{23}{60}$ths for his twenty-three years of actual service under the county justices; with $\frac{10}{60}$ths added for ten years because he had retired for the purpose of facilitating improvements in the organisation of the prison department; and $\frac{5}{60}$ths added for five years under sect. 4 of the Superannuation Act 1859 (22 Vict. c. 26). The Commissioners apportioned $\frac{28}{60}$ths of the annuity to be paid by the county justices out of the county rates, leaving the $\frac{10}{60}$ths to be paid out of grants provided by Parliament. C. was under sixty years of age, and was not incapacitated by illness or otherwise. The Commissioners did not make or lay before Parliament a special minute within the meaning of sect. 7 of the Superannuation Act 1859:—*Held*, affirming the decision of the Court of Appeal, that the provision in sect. 7 of the Superannuation Act 1859 as to a special minute was directory only; that the Commissioners had power to make the award under the Prison Act 1877 s. 36, and the Superannuation Act 1859 ss. 2, 4, and 7; and that the county justices were liable for the proportion charged upon them. JUSTICES OF MIDDLESEX *v.* THE QUEEN - - - - - - 757

PRIVILEGED COMMUNICATION — Interrogatories - - - - - 81
See PRACTICE. 2.

PROFITS — Foreign patent — Prolongation — Accounts - - - - 592
See PATENT. 1.

PROSPECTUS—Misrepresentation in - 187
See FALSE REPRESENTATION.

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PURCHASE—By executor who has not proved
See EXECUTOR. [733

QUANTUM MERUIT—Barrister—Law of Quebec - - - - - 745
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QUEBEC, LAW OF - - 150, 170, 745
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RAILWAY COMPANY—Lands Clauses Act 480,
See LANDS CLAUSES ACT. 1, 2. [787

—— West Australia—Compensation - 142
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REGISTRATION—Bill of sale - - 653
See BILL OF SALE.

REMUNERATION—Barrister—Law of Quebec
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RENEWABLE LEASE—*Lease for Lives—Covenant for Renewal on dropping of one or more Lives—Construction.*] A lessor demised hereditaments to the lessee, his heirs and assigns, for the natural lives of the lessee and two other persons and the longest liver of them, with a covenant that the lessor, his heirs and assigns (upon the lessee, his heirs or assigns "surrendering this present demise as hereinafter mentioned"), should at any time thereafter at the request of the lessee, his heirs or assigns, "as often as one or two life or lives of, and in the said hereditaments" should drop and be determined, renew and grant a further term "for any other life or two lives of any other person or persons to be nominated by the lessee, his heirs or assigns, in the stead of the persons life or lives so dropping or determining;" the lessee, his heirs or assigns, paying to the lessor, his heirs or assigns, "for every such renewal for every life or lives of such person or persons so to be renewed as aforesaid the sum of 40*s.* only, and at the same time surrendering this present demise to be cancelled":—*Held*, reversing the decision of the Court of Appeal, that upon the true construction of the covenant the right of renewal was neither perpetual, nor limited to one renewal for not more than two new lives, but was a right of renewal as often as any of the three original lives should drop, so that any such renewal might take place either on the dropping of any one of the said three lives, or after the dropping of any two of them, as the lessee might from time to time request. Swinburne *v.* Milburn - - - - - 844

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SALE OF GOODS—*Contract for Delivery of Goods by Instalments—Contract, Rescission or Repudiation of—Company, Winding-up of—Set-off of unliquidated Damages against Claim of Company in Winding-up — Counterclaim — Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Order* xix. *r.* 3.] The respondents bought from the appellant company 5000 tons of steel of the company's make, to be delivered 1000 tons monthly, commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of that month's instalment, and in the beginning of February made a further delivery. On the 2nd of February, shortly before payment for these deliveries became due, a petition was presented to wind up the company. The respondents bonâ fide, under the erroneous advice of their solicitor that they could not without leave of the Court safely pay pending the petition, objected to make the payments then due unless the company obtained the sanction of the Court, which they asked the company to obtain. On the 10th of February the company informed the respondents that they should consider the refusal to pay as a breach of contract, releasing the company from any further obligations. On the 15th of February an order was made to wind up the company by the Court. A correspondence ensued between the respondents and the liquidator, in which the respondents claimed damages for failure to deliver the January instalment, and a right to deduct those damages from any payments then due; and said that they always had been and still were ready to accept such deliveries and make such payments as ought to be accepted and made under the contract, subject to the right of set-off. The liquidator made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. The respondents counter-claimed for damages for breaches of contract for non-delivery;—*Held*, affirming the decision of the Court of Appeal, that, upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery; that the respondents had not, by postponing payment under erroneous advice, acted so as to shew an intention to repudiate the contract, or so as to release the company from further performance.—That s. 10 of the Judicature Act, 1875, imported into the winding-up of companies the rules as to set-off in bankruptcy; that the respondents were entitled, after the winding-up order was made, to set off damages for non-delivery against the payments due from them, and to counter-claim for damages in this action. Mersey Steel and Iron Company *v.* Naylor, Benzon & Co. - - - 434

SCOTCH LAW—*Bankruptcy—Notour Bankruptcy—Statutes* 19 & 20 *Vict. c.* 79; 43 & 44 *Vict. c.* 34—*Sequestration—Contingent Debt—Bankruptcy* (*Scotland*) *Act*, 1856, *ss.* 14, 31.] The Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 34), s. 6, enacts that in any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency, concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment, followed by the lapse of the days intervening prior to execution without payment having been made.—The Court of Session decerned A. to pay to B., with an execution of charge thereon

SCOTCH LAW—*continued.*

indorsed, dated the 8th of June, 1883. The days of charge on the said decree expired on the 14th of June, 1883, and payment had not been then made; but on the 13th of June A. intimated to B. that he had appealed to this House against the decree, and on the 20th of June the usual order of service in the said appeal granted on the 18th of June was duly served on B.:—*Held*, affirming the decision of the Court below, that there was no notour bankruptcy under the statute, which could not be affected by the appeal.—By letters C. agreed that any advances he made to A. on I. O. U.s should not be an obligation against A. upon which he could sue A., or use diligence against him, but that they should until final adjustment of a joint adventure be retained as vouchers of the current account, "upon which I cannot sue you or use diligence for them against you." A. became notour bankrupt, and C., the petitioning creditor, in a petition for sequestration founded on the debt forming the balance of the accounts current, which he vouched by the I. O. U.s.:—*Held*, affirming the decision of the Court below, that the debtor having become notour bankrupt, C. was not barred by the agreement from applying for sequestration.—*Per* Lord Watson:—A contingent debt within the meaning of sect. 14 of the statute of 1856 is a debt which has no existence now, but will only emerge and become due upon the occurrence of some future event. Fleming *v.* Yeaman - - 966

2. —— *Cheque—Negotiability—Countermand of Drawer—Onerous Indorsee—Findings of the Court of Session on Appeal from Sheriff's Court—Judicature Act of Scotland,* 1825 (6 *Geo.* 4, *c.* 120), *s.* 40—*Bills of Exchange Act,* 1882 (45 *&* 46 *Vict. c.* 61, *ss.* 3, 73.] A banker's draft or cheque is substantially a bill of exchange, attended with many, though not all of the privileges of such; and both in England and Scotland it is as much a negotiable instrument; consequently, the holder, to whom the property in it has been transferred for value, either by delivery, or by indorsation, is entitled to sue upon it if upon due presentation it is not paid.—Per Lord Blackburn:—The definition given in sect. 3 of the Bills of Exchange Act, 1882, embraces in it a cheque: and that Act is declaratory of the prior law.—On a Saturday A. granted a cheque on his account with the Bank of S. for, inter alia, £250, crossed blank in favour of B. On the same day B. indorsed the cheque, and paid it into the Bank of C., of which he was a customer. The Bank of C. immediately on receipt of the cheque carried the amount to B.'s credit, and thus reduced a debit balance standing against him. On the Monday following A. stopped payment of the cheque at the Bank of S., consequently when the Bank of C. presented it, payment was refused. The Bank of C. sued A. in the Sheriff's Court for the amount. On appeal, the Court of Session found that the cheque was granted to B. to reduce the balance at his debit with the Bank of C.; that A. agreed the cheque should be so used; and that in pursuance of that agreement the cheque was indorsed to the Bank of C. and given to them as cash, and the contents being put to B.'s credit the balance at his debit was thereby

SCOTCH LAW—*continued.*

reduced:—*Held*, that in accordance with *Mackay* v. *Dick* (6 App. Cas. 251): statute 1825, s. 40, this House was limited to the findings of the Court of Session and the record; that the findings in fact were distinct, intelligible, and within the record; that it followed from them as a matter of law that the Bank of C. were onerous holders of the cheque, and therefore the Bank of S. not having paid the cheque on demand, the Court below was right in holding that A. was liable.—*Currie* v. *Misa* (1876, Law Rep. 10 Ex. 153; 1 App. Cas. 554) commented on. *De la Chaumette* (1829, 9 B. & C. 208) explained. Dicta of the Judges in *Macdonald* v. *Union Bank* (1864, 2 Court Sess. Cas. 3rd Series, 963) approved. M'Lean *v.* Clydesdale Banking Company 95

3. —— *Husband and Wife—Marriage Contract—Provision to Children of prior Marriage—Rule of Law—Intention of Truster—Trust—Irrevocability.*] The general rule of law is that the Courts will not enforce a marriage settlement in favour of stranger volunteers who are not parties to the contract, on the ground that they are not within the consideration of the marriage. But when the persons who are within the consideration of the marriage take only on terms which admit to a participation with them others who would not otherwise be within the consideration, then, not the matrimonial consideration, but the consideration of the mutual contract extend to and comprehend them.—Where in an ante-nuptial contract of marriage, the intention of the owner of the property, a widow with children, was to make the children of the prior marriage and those procreated of the second marriage *a single class*, the members of which class were to take equally among them, subject to a power of apportionment, it is inconsistent with this intention to hold that some of the children take vested interests, as they come into existence, and that others take nothing except subject to a testamentary power: and in such a case the vested interest of the children of the earlier marriage is not contingent on there being children of the second marriage, for the effect and operation of the deed must be determined at the time it was executed. —A widow possessed of certain heritable and movable property, who had children alive by her first husband, by deed before her second marriage, to which her husband was a party, conveyed her property to trustees for behoof of herself "in liferent for her liferent alimentary use of the annual proceeds thereof allenarly and seclusive of the jus mariti of" her husband, "and not affectable by his or her debts or deeds or by the diligence of their creditors, and for behoof of the children procreated or to be procreated of" her body, "in such proportions and on such terms and conditions as she might appoint by a writing under her hand, which failing, equally among them share and share alike," &c., "in fee." The trustees entered into possession, and applied the income for the behoof of the wife. She died without issue by the second marriage, leaving testamentary deeds by which she cut down one of the children's interest to a sum much less than he would have taken under an equal division of her estate. He raised this action for declarator

SCOTCH LAW—*continued.*

of his right to an equal share of her estate; and the sole question *now* for decision was whether the marriage contract was revocable:—*Held*, reversing the decision of the Court below, that the provision of the marriage contract in favour of the children of the prior marriage was irrevocable. Mackie *v.* Herbertson - - 303

4. —— *Husband and Wife—Wife's Adultery—Condonation—Subsequent acts of Misconduct—Doctrine of Canon Law—Non-revival of condoned Adultery in Scotch Law—Weight of English Divorce Cases.*] By the law of Scotland full condonation of adultery (remission expressly or by implication in full knowledge of the acts forgiven), followed by cohabitation as man and wife, is a remissio injuriæ absolute and unconditional, and affords an absolute bar to any action of divorce founded on the condoned acts of adultery. Nor can condonation of adultery—cohabitation following—be made conditional by any arrangement between the spouses.—Although the condoned adultery cannot be founded on, condonation does not extinguish the guilty acts entirely, and they may be proved so far as they tend to throw light upon charges of adultery posterior to the condonation.—A wife confessed to several acts of adultery with E. Her husband forgave her and resumed cohabitation on the alleged condition that she should not speak or hold any communication with E. again. Subsequently she met E. by appointment several times under suspicious circumstances; but, admittedly, no act of adultery could be proved. The husband sued for a dissolution of the marriage on the ground that the condoned adultery was revived by the wife's subsequent conduct:—*Held* (affirming the decision of the Court below), that to obtain a divorce he must prove adultery subsequent to the condonation, and no less.—The doctrine laid down in *Durant* v. *Durant* (1 Hagg. Ecc. Rep. at p. 761) not approved without qualification.—*Dent* v. *Dent* (34 L. J. (P. M. & Ad.) 118; 4 Sw. & Tr. at p. 106). Direction of Lord Penzance to the jury questioned on principle; and that case distinguished from *Blandford* v. *Blandford* (8 P. D. 19), adultery reviving desertion.—*Per* Lord Blackburn:—The doctrine of revival of adultery as a ground on which a divorce has been granted is to be strongly objected to as varying the status of married persons. On principle, a reconciliation being entered into with full knowledge of the guilt and with free and deliberate intention to forgive it, where that reconciliation is followed by living together as man and wife, the status of the couple ought to be the same and not more precarious than if there was a new marriage.—*Per* Lord Blackburn:—Assuming it to be now established English law that any matrimonial offence, though forgiven, may be revived by any other matrimonial offence of which the Courts take cognizance, it is very modern law, and not so obviously just and expedient that this House ought to infer that it either was or ought to have been introduced into the law of Scotland.—See Lord Watson's opinion (p. 257), for the terms of a remission of adultery which would not constitute plena condonatio in the law of Scotland. Collins *v.* Collins - - 205

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SETTLEMENT—Scotch law—Children of prior marriage - - - 303
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SHELLEY'S CASE—Rule in - - 890
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SHIP—*Charterparty*—"*Frost preventing loading.*"] By a charterparty a ship was to proceed to Cardiff, East Bute Dock, and there load in the customary manner from the agents of the freighters a cargo of iron, "Cargo to be supplied as fast as steamer can receive. . . . Time to commence from the vessel being ready to load and unload and ten days on demurrage, over and above the said lay days, at £40 per day. (Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading . . . .; in which case owners to have the option of employing the steamer in some short voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship.)"—The ship arrived at the East Bute Dock and loaded part of her cargo. A frost then set in and made a canal which communicated with the dock impassable, so that the remainder of the cargo which was ready at a wharf on the canal could not for several days be brought in lighters to the dock. The cargo could not have been brought into the dock by carting or otherwise at any reasonable expense. The dock itself was not frozen over and if the cargo had been in the dock the loading might have proceeded:—*Held*, affirming the decision of the Court of Appeal, that the frost did not "prevent the loading" within the meaning of the exception. Grant & Co. *v.* Coverdale, Todd & Co. - - - - - - 470

2. —— *Maritime Lien—Vice-Admiralty Jurisdiction—26 & 27 Vict. c. 24, s. 10, sub-s. 10—Necessaries.*] No maritime lien attaches to a ship in respect of coals or other necessaries supplied to it.—Vice-Admiralty Courts have not (apart from statute) more than the ordinary Admiralty jurisdiction, i.e., as it existed before 3 & 4 Vict. c. 65, enlarged it. The Vice-Admiralty Act, 1863 (26 & 27 Vict. c. 24), s. 10, sub-s. 10, does not create a maritime lien with respect to necessaries supplied within the possession. Laws *v.* Smith. The "Rio Tinto" - - 356

3. —— *Navigation—Collision—Damage—Liability for Collision—Equal Negligence—Regulations for Preventing Collisions at Sea—Sailing Rule 18.*] In accordance with the 18th sailing rule, under Order in Council, 14th of August, 1879, it is the duty of those in charge of a steamship in motion, when they perceive that a risk of collision is involved, to reverse their engines and bring their ship to a standstill on the water.—A

SHIP—*continued.*

collision occurred between the steamship *A.* and the steamship *B.* The evidence was most contradictory. It was, however, satisfactorily proved that although the crew of the ship *B.* had been until a few minutes before the collision engaged in getting the anchors on board in shipshape order, and that the captain had left the deck when he ought to have been there, yet that when it was perceived the two vessels were approaching in such a manner as to involve risk of collision the engines were reversed, and the ship stopped. On board the ship *A.* everything was proved to have been in good order at the time of the collision. But her captain did not stop his engines until almost the moment of collision, and consequently the ship *A.* cut into the ship *B.* to the water's edge;—*Held*, reversing the decision of the Court below, that there was fault on both sides, contributing to the damage and loss which had been suffered, and therefore neither were entitled to damages. Maclaren *v.* Compagnie Française de Navigation à Vapeur - 640

4. —— *Navigation—Collision—Negligence by Complaining Vessel.*] Where there has been a departure from an important rule of navigation, if the absence of due observance of the rule can by any possibility have contributed to the accident, then the party in default cannot be excused.—Where the lights of the complaining vessel were not properly burning, and were not visible on board the other vessel, *held*, that in the absence of proof that this latter was also to blame, the suit must be dismissed. Emery *v.* Cichero. The "Arklow" - - - - - 136

5. —— *Navigation—Collision—Negligence—Contributory Negligence—Thames Rules, No. 23.*] Rule 23 of the Thames Rules is not confined to the seaward side of "a line drawn from Blackwall Point to Bow Creek."—The order of the Court of Appeal reversed and the order of Butt, J., restored, on the ground that even assuming (but without deciding) that the construction put by the Court of Appeal upon rule 23 was correct and that the *Clan Sinclair* had transgressed that rule, yet such transgression was not the cause of the collision; that ordinary care on the part of the *Margaret* would have enabled her to avoid the collision, and that she alone was to blame. Cayzer *v.* Carron Company - - 873

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TRUSTEE—*Cestui que Trust—Liability of Trustee for Trust Moneys lost through Broker.*] A trustee investing trust funds is justified in employing a broker to procure securities authorized by the trust and in paying the purchase-money to the broker, if he follows the usual and regular course of business adopted by ordinary prudent men in making such investments.—A broker employed by a trustee to buy securities of municipal corporations authorized by the trust, gave the trustee a bought-note which purported to be subject to the rules of the London Stock Exchange and obtained the purchase-money from the trustee upon the representation that it was payable the next day, which was the next account day on the London Exchange. The broker never procured the securities but appropriated the money to his own use and finally became insolvent. Some of the securities were procurable only from the corporations direct and were not bought and sold in the market, and there was evidence that the form of the bought-note would have suggested to some experts that the loans were to be direct to the corporations; but (as the House held on the facts) there was nothing calculated to excite suspicion in the mind of the trustee or of an ordinary prudent man of business; and such payment to a broker was in accordance with the usual course of business in purchases on the London Exchange:—*Held*, affirming the decision of the Court of Appeal (Lord FitzGerald doubting), that the trustee was not liable to the cestuis que trust for the loss of the trust funds.—*Semble*, by the Earl of Selborne, L.C., that if the broker had represented to the trustee that the contracts were with the corporations for loans direct to them from the trustee he would not have been justified in paying the money to the broker, for which in such a case there would have been no moral necessity or sufficient practical reason. Speight *v.* Gaunt - - - - 1

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VICTORIA, LAW OF — *Melbourne Harbour Trust Act, sect. 46—Notice of Action—Interpretation—Acts divided into Headings.*] *Held*, that an action against the Melbourne Harbour Trust Commissioners was an action brought against a "person" within the meaning of sect. 46 of the Melbourne Harbour Trust Act; and that notice in writing thereof complying in form or in substance with the requirements of the section was necessary.—Remarks as to the effect upon interpretation of dividing an Act into parts with appropriate headings.—*Eastern Counties and London and Blackwall Railway Companies* v. *Marriage* (9 H. L. C. 32), distinguished. Union Steamship Company of New Zealand *v.* Melbourne Harbour Trust Commissioners - - 365

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WATER—Right to accumulation - - 170
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WATERWORKS COMPANY — *Water-rate to be calculated on "annual value"—"Annual value" meaning net annual or rateable Value.*] A water company by a special Act of 1826 were compellable to supply water to certain dwelling-houses in the metropolis for domestic purposes at certain rates per cent. per annum payable "according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor's-rate is computed in the parish or district where the house is situated."—By a special Act of 1852 the company were compellable to furnish the water "where the annual value of the

WATERWORKS COMPANY—*continued.*
dwelling-house or other place supplied shall not exceed £200 at a rate per cent. per annum on such value not exceeding £4; and where such annual value shall exceed £200, at a rate per cent. per annum on such value not exceeding £3."—The occupier of one of the houses was lessee for a long term at a ground rent, and paid no rent except the ground rent:—*Held*, reversing the decision of the Court of Appeal, that whether the later Act repealed the provisions of the former or not the case must be dealt with under the later Act; and that the words "annual value" in the later Act meant "net annual value" as defined in the Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1.—*Held*, also, that "annual value" had the same meaning in the earlier as in the later Act.—*Colvill* v. *Wood* (2 C. B. 210) commented on. DOBBS *v.* GRAND JUNCTION WATERWORKS COMPANY - - - 49

WEST AUSTRALIA, LAW OF—*Western Australian Railways Act of* 1878 (42 *Vict. No.* 31), *ss.* 14 *and* 16—*Notice—Right of Resumption—Compensation.*] *Held*, in a case where the Crown had a power of resumption under the terms of its grant, and had given lawful notice in exercise of such power, such notice must not be deemed to be under sect. 12 of the Railways Act of 1878 (entitling the parties affected to compensation under sect. 14); *secus* where notice could not have been lawfully given except under this Act. THOMAS *v.* SHERWOOD - - - - - - 142

WILL — *Devise* — *Construction* — "*Estate*" — "*Child or Children*"—"*Dying without Issue*"—*Rule in Shelley's Case* (1 *Rep.* 93 *b*).] By a will made in 1820 the testatrix said "I give and devise unto my eldest son Thomas all my real and freehold estate and all leases and leasehold premises now in my possession (subject to the payment of the rents and the performance of the covenants mentioned in the said indentures of leases) during the term of his natural life, and after his decease to his legitimate child or children (if there be any); but if he dies without issue my will is it may go unto my other son William during the term of his natural life, and afterwards to his legitimate child or children (if any): but if he should likewise die without issue my will is it may go to my daughter Mary and to her heirs and assigns for ever."—The will then gave legacies to the second son and the daughters, with provisions for the daughters, to be paid in the first instance by Thomas, but to be repaid in part or in whole to him in certain events by his successor in the estate. Thomas died without issue.—*Held*, by EARL CAIRNS and LORDS BLACKBURN and FITZGERALD, affirming the decision of the Court of Appeal, that reading the whole will together Thomas took an estate tail in the realty.—*Contrà*, by the EARL OF SELBORNE, L.C., and LORD BRAMWELL, that Thomas took an estate for life, with remainder to his children (if any) in fee as purchasers. BOWEN *v.* LEWIS - - 890

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—— "Dying without issue" - - 890
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—— "Temperate" - - - - 671
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